UCP & INCOTERMS

Legal study of letter of credit problems

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Delivery date: 03.09.2007

Words: 18 624

FOREWORD

During the last ten years my working practice have been within shipping and offshore law firms, shipping banks, ship owner & shipbroker companies and major oil & gas offshore companies. Some interesting projects I've been working on are based on INCOTERM contracts which require a letter of credit (L/C), as a financial instrument for payment. To my surprise I discovered that this type of banking contracts - which is very important from an economic point of view, and legally gives us many interesting problems - has in fact not been properly tested in the Scandinavian courts. This gave me the motivation to start researching some of the UCP rules in relation to an INCOTERM contract under a wider perspective. The result hopefully will clarify some of the L/C legal principles and help contract management to minimizing their potential risk in these highly specialized trades.

The legal study developed after being accepted to the Master of Law program in Maritime Law at the Scandinavian Institute of Maritime Law in Oslo. At the Institute I had my own research desk, and thereby I will give my greatest gratitude to the Institute and its staff. If I had not been granted the possibility to work at the Nordic Institute for Maritime Law - with it's first class library, and other equipment, and the inspiring environment - the thesis of "UCP & INCOTERMS" would not seen the light of day. Especially I will give my gratitude to the Head of the Maritime Law course, Professor Dr. juris Hans Jacob Bull, Professor/Phd/Lawyer Louis Skyner responsible for the course English law of contract, Professor/Lawyer Ola Mestad responsible for the course offshore construction contracts, Professor Dr. juris Ulf Hammer responsible for the course Petroleum law and my appointed supervisor Professor emeritus Thor Falkanger.

Under the legal study there have been several people that have contributed. I give my thanks to all, but gives a special thanks to the Trade Finance department at Nordea Head office, which helped me analyze several letters of credits as regard to the content of documents for Marine Bills of Lading, cargo surveyor certificate, cargo insurance, SWIFT of transferable credits etc. Ulf Hagen CEO at Maritime Consultants, for giving me good advice, especially related to clauses for Marine Bills of Lading. I would also like to thank Wikborg Rein shipping department for using many hours dealing with specific exclusion clauses. Other law firms which have contributed to the thesis will be the law firm BAHR, dealing with third party problems in relations to assignment of contract rights and obligations. At least and maybe most important, the law firm Thommessen, coaching on Norwegian contractual relation and claims in shipping and offshore, especially related to the Norwegian Sales of Goods Act and the Norwegian Act relating to conclusion of agreements.

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PART I – Legal placing of subject

CHAPTER 1: INTRODUCTION

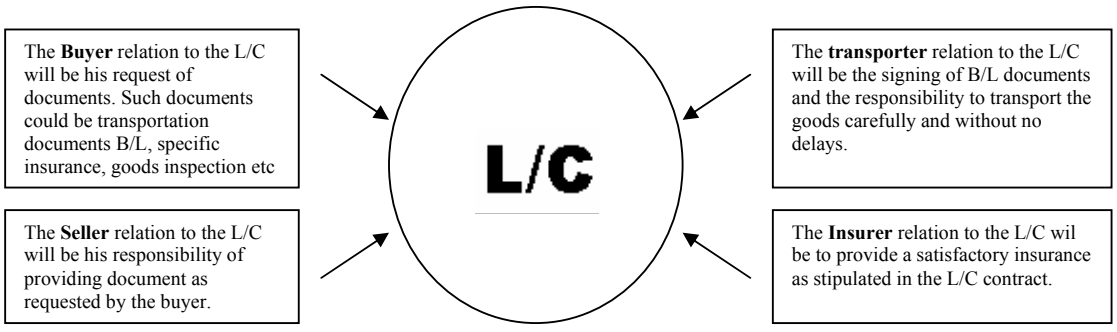
1.1 Presentation of legal study

In 1933, the International Chamber of Commerce formulated the UCP, which is now a set of universally accepted governing rules for letters of credit and the most successful private rules for commerce ever developed.[1] But rules require interpretation, and courts worldwide have interpreted how the UCP should be applied in daily practice. In this thesis, some of the most important court cases interpreting the UCP have been collected, analyzed and explained.

Regarding disputes and available remedies in the L/C & INCOTERM contract the UCP soft law has no system of how to calculate contractual damages. So the thesis will give a thorough analysis of contractual damages which will be based on the law for sale of goods and the law of contracts.

1.1.1 Problem to be addressed and the involving contracts

Today, more than 15 percent of international trade - over $1 trillion a year - is financed using a letter of credit.[2] And when letters of credit are used in shipping and offshore, there will in practical be a range of contracts involved. First of all, there is a sale contract (based on INCO-term) and a L/C contract (referring to the UCP rules). If the goods are to be transported by sea there need to be a transportation contract, and usually also a contract of insurance. Each contract has its own sets of rules, but with a dependent co-operation. This will typically be when the sale contract stipulates that the buyer need to secure the payment through a guarantee, such as an L/C.



[1] Leading Court Cases on Letters of credit, by King Fung (last page)
[2] Leading Court Cases on Letters of credit, by King Fung (last page)

1.1.2 Source of law and important understandings

For the reader to understand and to be clear of which set of rules apply - the thesis will mainly focus on the rules governing letters of credit[3] - which are drawn up by the Paris-based ICC (International Chamber of Commerce). The full title: Uniform and Practice of Commerce (UCP). UCP is thus a private set of rules which are incorporated into individual contracts with banks. The rule "shall apply to all Documentary Credits where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressed stipulated in the Credit" (art. 1).[4]

To understand the relation between the L/C and the Sale contract, the important issue is that the seller often require a L/C to secure the payment from the buyer. A seperate clause in the sale contract should then be included. e.g. "the L/C represents absolute payment". When this clause is included in a sale contract, the buyer waive his rights for other forms of payment, and thereby only receive goods by providing a L/C. Due to the UCP rules are extremely sensitive by providing correct documentation, the importance of knowing the UCP rules will be of special importance for the one who should provide documents, such as a seller or a manufacture.

UCP soft laws – given by ICC in France – have no system of how to calculate damages. The soft law has neither any limitation rules, and contractual damages will solely be calculated by common rules on the law of contract,[5] and the sale of goods (SGA).[6] Damages in tort and responsibility for third parties will be based on the Tort Act.[7] In this thesis the principal background rules of law will be Norwegian - but due to lack of rules and court decisions involving L/C's – the thesis will especially include English Law of Contract.[8] This is also due to that the English law is the most use law in shipping and offshore world wide.

Court decisions in the Scandinavian law reports (ND)[9] will be an important source of law,[10] but due to few L/C disputes are settled in the Scandinavian courts, the source of law would most likely be referred to arbitration publications or other international cases involving the UCP.[11] As referred to the "carriage of goods by sea", the rules associated with Haag- Visby[12] and Hamburg conventions[13] have been determinative to the Norwegian Maritime Code.[14] It will therefore be important for the reader to know of these rules. The contractual parties usually also include a cargo insurance contract, and relevant law will be the Norwegian cargo clause.[15]

Further explanation on the source of law will be given in the relevant chapter(s).

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[3] Uniform and Practice of Commerce (UPC). Rules set out by International Chamber of Commerce
[4] Bull/Falkanger, page 257
[5] Norwegian common rules on the law of contract (Avtaleloven)
[6] Norwegian Sale of Goods Act (SGA)
[7] Norwegian Tort Act (Tort)
[8] English Law of Contract. Principles of contractual relations and calculating of damages
[9] Fellesnordisk domssamling (Nordisk domme i sjøfartsanliggende – ND)
[10] Falkanger/Bull; Innføring i sjørett page 11
[11] International cases related to UCP will be up for discussion in the thesis part III
[12] Haag- Visby rules. International convention of 1924 (Bills of Lading)
[13] United Nations Convention for carriage of goods. Hamburg 1978
[14] Norwegian Maritime Code (NMC)
[15] Norwegian cargo clause (NCC)

1.1.3 Explanation of terms, limitation and the thesis depth analysis

The main focus of this thesis will be on the ”**trade finance practitioners**”[16] who deals with contracts in shipping and offshore, and the ”**L/C beneficiary**”[17] who want to secure his/hers payment through a financial instruments.

The legal analyses and results will especially be of interest within law firms who advice on contract writing which include letters of credit, banks that need to be updated on UCP rules and L/C beneficiaries who demands payment after submitting documents. More specific, the thesis will identify the obligations, costs and risk for the parties involved, and give an idea of how to calculate different claims in the L/C contract and the sale contract.

Due to there are many participants in these highly specialized trades, the thesis will first give an overview of the common legal principles. This will especially be of importance for the reader to easily find references to the applicable law and rules, e.g. articles related to UCP, rules related to the law of contract, maritime law, insurance law, etc. The thesis will further focus on terms & conditions that will be highly important to conclude the L/C & Sale contract. In relation to disputes and available remedies, the thesis will go in depth to analyze important and interesting cases, which set the principles of how to interpret the UCP rules. This involves depth analysis of previous L/C disputes, the court decision and possible transmission value to the Norwegian law. The selected cases with their final rulings are supported by ICC and thereby gives a good indication of how to interpret the UCP rules.

Before analyzing the L/C problems, it will be of great importance to understand the commercial interests and the parties' need of minimize their potential risk. It is the commercial parties who set the terms, and the risk of these highly specialized trades depends fully on the given sale contract (INCOTERM). When this is said the legal study will go in depth for specific problems which are particular difficult for trade finance practitioners to solve, as there are close to no relevant Scandinavian cases which can be referred to, only international cases based on the soft law issued by the well known organization ICC in France.

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[16] To explain the thesis use of the wording “**trade finance practitioners**” the reader should know that this is the most used concept of wording for other authors dealing with L/C's. To make it easy for the reader to understand, a trade finance practitioner will be a person who deals with L/C contracts. This could either be a Seller (S), a Manufacture (M) or a Buyer (B). Also, due to law firms often gives advice on UCP rules, a lawyer would be included as a trade finance practitioner. Last but not least, a bank which provides the L/C will of course be included as a trade finance practitioner.

[17] To explanation the thesis use of the wording ”**L/C beneficiary**” the reader should know there are two types of L/C beneficiary. First you have the seller (S) which could be explained as “first L/C beneficiary”. Secondly, we have the manufacture (M) which could be explained as the “second L/C beneficiary”.
All these terms explained are generally accepted through other literature dealing with L/C's.

1.2 Outline – thesis

Part I – Legal placing of subject

The presentation of the legal study in chapter 1.1 should give the reader an overview of the problem to be addressed and the involving contracts. Also, the source of law will be explained. In the beginning there will be a need of explanation for terms, and these are to be found in chapter 1.1.3. In the same chapter the necessary limitation will be explained and what the reader could expect to be the depth analysis. After the presentation, the next chapter 1.3 will start by explaining the underlying sale and the bills of lading - including the L/C's high degree of influence of the rules associated with the bill of lading. Further more in chapter 1.4 and 1.5 there will be an explanation why it is important to use an L/C, both benefits for the seller and for the buyer. In chapter 1.6 there will be an illustration and explanation of how the parties issue a L/C. This illustration could be quite helpful for the reader to understand how a L/C is issued and who the involving parties will be. In chapter 1.7 there will be given an explanation of different Inco-terms, full set of incoterm to be found in appendix B. This chapter will focus on the sale contract, but due to the thesis mainly focus on letter of credit problems, all inco-terms will be linked to the rules given by UCP.

Part II – The importance of UCP rules related to contract writing

Part II of the thesis will focus on the importance of UCP rules related to contract writing, and the soft law issued by ICC, which has become an international standard, see chapter 2.1. The reader will be given an understanding of the strict rules of UCP, especially related to document examination. In chapter 3, the thesis will select important UCP rules as related to providing documents. This will particular give an answer on which documents that could be accepted, and those documents which will not be accepted. Part II will also explain the main rules of carriage by goods, see chapter 4 (Maritime Code). This chapter will have highly relevance as to the Bill of lading document which usually is required in the L/C. Part II will further give an overview of the applicable law as regard to calculation of damages in L/C & INCO-term contract, see chapter 5. First there will be an explanation of the Norwegian Doctrine and how the court most probable would handle the calculation of damages. At the end, there will be a high degree of focus related to the English legal system and the principles of calculating damages in L/C & INCO-term contracts. Chapter 5.5 particular involves the discussion for damages related to lost profit. In chapter 6 there will be given a short explanation of the insurance problem, but no depth analysis will be given on insurance. At last, part II will sum up the rules discussed and analyzed with a summary conclusion, both the rules on UCP and INCOTERM, see chapter 7.

Part III – Leading court cases on letters of credit

Part III will first discus different interesting and important cases, especially related to problem for the strict rules of document examination, see chapter 8 and chapter 9. This part will include analysis and interpretation of the UCP 600 article 27, "claused B/L documents", article 20, "goods received for shipment" and other articles related to document examination. Secondly, part III deals with the scenario when we have a breach of the L/C & INCO-term contract, see chapter 10. This depth analyze involve discussion on available remedies, such as lost profit and other consequential damages e.g. damages to third parties. In this chapter there

will be a high degree of focus related to calculation of damages and obligations to mitigate losses. Also, it will be important to understand how the court would handle different L/C disputes, and the thesis will give you some recommendations.

Part IV – The future aspect

Part IV will look at the UCP future aspect, and give recommendations of research findings. There will also be given some thought on the court decisions in English cases and the transmission value these cases has to Norwegian law, see chapter 11.2.

To give the reader a better overview, all chapters starts with an introduction, and list relevant material for further reading at the end.

1.3 The underlying sale and the bill of lading[18]

It is natural that requirements expressed in the sale contract reflects other contracts e.g. the contract of carriage. This means that the carrier to a large extent is "drawn into" the relationship between the buyer and the seller. In practice, the relationship will be even more complicated because of related insurance agreements and letters of credit, each of which will impose further requirements on the contract of carriage. The rules associated with **letters of credit** – which concern the bank's role in facilitating payment of the purchase price – have had a particular high degree of influence on the development of rules regarding the carrier's liability, as well as some of the rules associated with the bill of lading's use as a transport document.

Without using a letter of credit in a sale contract the principle of simultaneous exchange applies, see Sale of Goods Act § 10. Unless otherwise agreed, the seller need not deliver the goods until he has received the purchase price. Conversely, the buyer's need not to pay for the goods until the seller has delivered them. The buyer also wants to be certain that he not only receives items which appear to be the goods, but that the goods satisfy contractual specifications regarding quantity and quality. This can be accomplished by carrying out an inspection at the time of delivery. If the goods are defective, the buyer may terminate the contract or demand reduction in price. Similarly, the buyer can withhold payment if the seller tenders delivery at a non-contractual time.

1.4 So why do we need Letters of Credit – and what do the parties gain?

BASED ON THE SALE OF GOODS ACT THE SELLER BEARS THE RISK OF THE BUYER FAILING TO PAY AGAINST THE BILL OF LADING, BUT THIS CAN BE RESOLVED THROUGH THE RULES ON LETTER OF CREDIT[19] IN OTHER WORDS, THE LETTER OF CREDIT SECURE THE PAYMENT BEFORE THE GOODS ARE SENT BY A CARRIER.

In this content, the rules governing letters of credit can be outline as follows: [20]

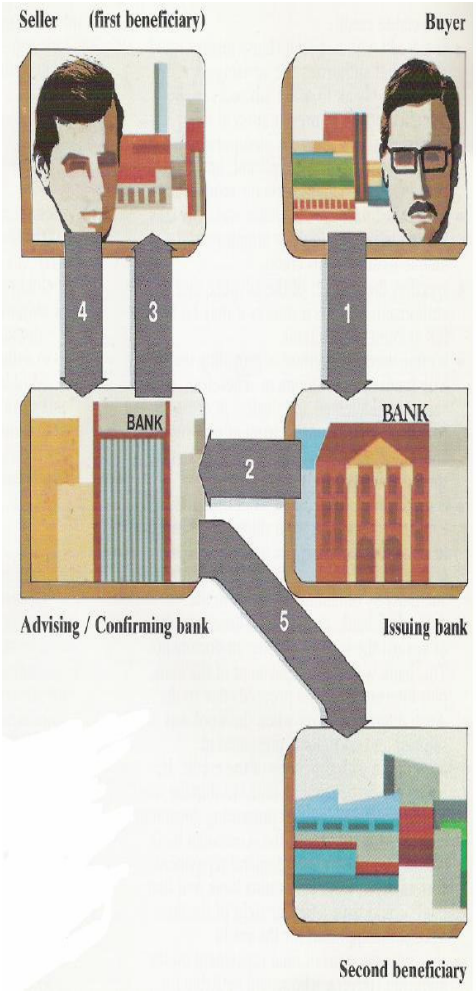
On the basis of instructions from the buyer, the bank undertakes to pay the purchase sum against receipt of certain documents with specific contents. In the case of CIF purchase, the most important documents will be the invoice, an insurance policy and a bill of lading. The bill of lading must conform precisely to the term of the credit. Even minor variations will cause the bank to reject the documents and refuse to make payment. An attempt to establish that the goods nonetheless conform to the sake contract will be futile. The letter of credit relates to documents, not goods.

[18] Bull/Falkanger, page 254
[19] Bull/Falkanger, page 257
[20] Bull/Falkanger, page 257

1.5 Possible problems and requirements solved by using a Letter of Credit[21]

SELLER:	BUYER
"We want to be certain that the buyer is able to pay on time once the goods have been shipped. How can we minimize risk of non-payment?" "We are supplying the buyer with goods that we ourselves have bought from a sub-contractor. How can we prevent the buyer from finding out and contacting our supplier directly?"	"We do not know the seller….. can we be sure that he delivers on time?" "Before we pay, how can we check that the goods are exactly those we ordered?"

1.6 Illustration of how the parties issue a transferable credit[22]



First, the seller (S) and the manufacture (M) conclude a sales contract providing for payment by letter of credit.

Secondly, the seller (S) and the buyer (B) conclude a second sales contract providing for payment by letter of credit.

The credit will be executed as follow;

1. The buyer (B) instructs his bank – the issuing bank – to issue a credit in favor of the seller (S) first L/C beneficiary.
2. The issuing bank asks the confirming bank to confirm the credit.
3. The confirming bank informs the seller (S) first L/C beneficiary that the credit has been issued, and asks them to accept or reject the credit.
4. If the credit is accepted by the seller (S), the confirming bank will transfer the credit to the manufacture (M) second L/C beneficiary to accept the credit.
5. If the manufacture (M) also accepts the credit, he then needs to deliver all the documents required. If the documents are accepted, the L/C sum will be released to both the seller (S) and the manufacture (M)

[21] Guide to Documentary Credit operations, publication issued by ICC (page 3)
[22] Guide to Documentary Credit operations, publication issued by ICC (page 35)

1.7 INCOTERMS – the choice of different kind of sale contracts

The parties' who want to enter into a sale contract need to have a general understanding of the transport obligations, costs and risks before they start contractual negotiations and decide on which INCO-term to use. The ICC's webpage provides Preambles explaining the function of each INCO-term and these are reproduced in full for visitors to the site.[23] The thesis will provide the reader with full details on all INCO-term, see Appendix B. Further more, this chapter will try to explain the most important INCO-terms and give the reader a better understanding of how the commercial parties usually operates in practical business life.

In the trade of goods, a manufacture (M) often require payment by delivery of the goods, e.g. at the harbor or on board the ship. The manufacture (M) usually focusing on getting paid as soon as possible and do not involve themselves in any carriage by sea. When the buyer (B) requires the goods to be delivered to a particular port overseas – and are reluctant to pay until goods are received – there will be a conflict of interest. And to satisfy both the manufacture (M) and the buyer (B) – a seller (S) might provide a good solution based on L/C instrument. For a seller (S) to involve himself in these kinds of trades, the real power of Transferable L/C's comes into force. As an example, the seller (S) first needs to conclude a sale contract with the manufacture (M), based on an "option sale" with a fixed price. Secondly, the seller (S) needs to find a buyer (B) who is willing to pay for the same goods by a transferable L/C. If the buyer (B) accepts the L/C terms, the seller (S) then need to set up a second sale contract based on a inco-term that included sea transportation. If the inco-term is based on a CFR sale, it will be important for the seller (S) to first check if there are available ships. If there are available ships for the particular goods, the seller will then be able to conclude all 3 contracts, as shown below.

SALE CONTRACT (no. 1)

Between the seller (S) and a manufacture (M)

If the manufactur (M) do not wish to provide for transportation, a sale contract could be based on the following inco-terms:

1. **FAS (excl transportation)**
2. **FOB (excl transportation)**
3. **CIP (excl transportation)**

SALE CONTRACT (no. 3)

Between the seller (S) and a buyer (B).

If the Buyer (B) requires the goods to be transported over sea, a sale contract could be bases on the following inco-term:

1. **CFR (incl transportation)**
2. **CIF (incl transportation)**
3. **DDP (incl transportation)**

TRANSPORTATION CONTRACT (no. 2)

Between the seller (S) and a transporter (T)

From load port (manufacture delivery port) to discharge port (buyer receiver port)

[23] ICC international webpage http://www.iccwbo.org

1.8 Documentary Credit problems – some main problems given by Lars Gorton

Lars Gorton[24] the Swedish author of the book "Rembursrett" lists some main problems to the "Letter of Credits". And the thesis will especially focus on A) and E).

A. The parties' non awareness of the strict rules related to UCP before entering into a sale contract. Usually the banks don't give advice before entering into a sale contract, and the strict obligations for the L/C beneficiary to present valid documents could be crucial without knowing the UCP rules. In relation to document examination the UCP rules are quite strict and only minor deviations would result in rejection and no payment for the L/C beneficiaries.

B. Irrevocable transferable letter of credits could be referred UCP 500 article 48 or UCP 600 article 38. When a seller only facilitates the involving contracts, the L/C needs to be issued on the terms requested by the manufacture, which could be referred to as the second L/C beneficiary. The seller further need to find a buyer that can match the terms requested by the manufacture. If the buyer then manage to issue the requested L/C, the parties can conclude the deal.

C. Relation to the carriers liability to damage or loss of goods by signing a marine Bills of Lading, with the strict rules of NMC §§ 275/299. There are also some interesting problems as related to carriers possibility to make a reservation in the B/L ref NMC § 298, compared to UCP strict rules of clean B/L ref UCP 600 Article 20.

D. Cargo insurance documents and problems that may arise if a bank do not accept the content of the insurance document. How to set up an cargo insurance which secure a CIF seller for direct action, with the possibility to pay the B/L holder. The importance of assureds duty to maintain and secure the claim (ref. the Norwegian Cargo Clause § 54) and how to interpret other indemnify clauses?

E. Breach of the L/C contract could amount in big claims. It will therefore be important to interpret the rules related to contractual damages, and quantify economical losses. If the court should provide the innocent party with remedies, there are many factors that might have an impact. First of all the court need to establish if the defendant has been negligent or not. Secondly the court needs to check if the plaintiff has mitigate the loss and if the damages is to remote. All these problems are quite difficult to solve, and the topic most definitely require further researching.

F. Jurisdiction problems and choice of law are essential problem related to remedies available. The parties need to be aware that a court decisions in a different country may not be bound to the other party, this especially involves remedies which are quite different between third world countries and Europe. The role of the ICC and the UCP rules for Documentary Credits are only an guidance for the bank issuing and confirming the credit, and do not handle relations to damages.

[24] GORTON, Rembursrett 1980, page 352

1.9 Further reading

Leading court cases on letters of credit / Fung, King Ta 658
Rembursrätt / Gorton, Lars 102
Documentary credits : article-by-article, by Raymond Jack, Ali Malek and David Quest
Guide to documentary / International 415. published by ICC
Fellesregler for Remburs (UCP 500) : en norsk utgave
Letters of credit 1988
Transnational commerce onal instruments and com
Case studies on : problems, qu 489
More case studies on : problems, qu 489
ICC Uniform Customs a documentary Credit 500
Rembursretten; Bergen privatbank

PART II

TERMS & CONDITIONS TO BE NEGOTIATED IN THE L/C AND INCOTERM CONTRACT

CHAPTER 2: THE IMPORTANCE OF UCP RULES RELATED TO CONTRACT WRITING

2.1 Introduction

The strict obligations for the seller to present valid documents could be crucial without knowing the UCP rules, which particularly could be illustrated with the strict rules related to documents. Even minor variations will cause the bank to reject the documents and refuse to make payment.[25] An attempt to establish that the goods nonetheless conform to the sale contract would be futile. The letter of credit relates to documents, not goods. (The full set of UCP rules could be found in APPENDIX A). Further explanation of the rules will be given in chapter 2.2; "UCP 600, the new rules applicable 1 July 2007", chapter 2.3; "Choice of contractual type – revocable or irrevocable" and chapter 2.3; "Presentation of document required in the L/C contract". Related to documents required in L/C's, there will be given a thorough explanation of the UCP rules in chapter 3. This chapter will focus on the L/C beneficiary, and if they are able to provide the required document(s).

Before the parties entering into a sale contract with supply of goods – where the L/C represent the only payment - it is vital to have a good understanding of documents the bank requires in order to pay the L/C sum.

A classic example is an old Danish case where the letter of credit instructions from the buyer to the bank referred to bills of lading for "håkjerringkjøtt" (Greenland shark meat). However, the bank accepted the bill of lading, despite its reference to "håkjerringfisk" (Greenland shark fish). The buyer maintained that the bank was in breach, and the Commercial Court agreed. The Supreme Court reached a different result, not because it disagreed with the strict interpretation, but because the buyer had previously accepted fish when they actually had paid for meat.[26]

In the dispute as illustrated above, the Danish Supreme court focus to a large extent on other circumstances around the case, rather than the UCP rules. And by adopting this use of interpretation by the courts', the validity of the UCP rule will be heavily reduced. It is quite unclear if the Danish ruling in 1911[27] illustrates the Nordic thinking related to L/C disputes.

[25] Bull/Falkanger, page 257
[26] GORTON, Rembursrett 1980 page 255.
[27] Further interpretation of the ruling could be referred to Smith. Notes on page 60.

Although it could be logical to include other circumstances, this should not interfere in the banks obligation check documents for discrepancies. For common people - it would be outrages to receive fish instead of meat - and the Supreme Court attitude in 1911 do not comply with common sense. The today's court would most probable favor the plaintiff, which then would hold the bank liable for accepting a discrepant bill of lading document.

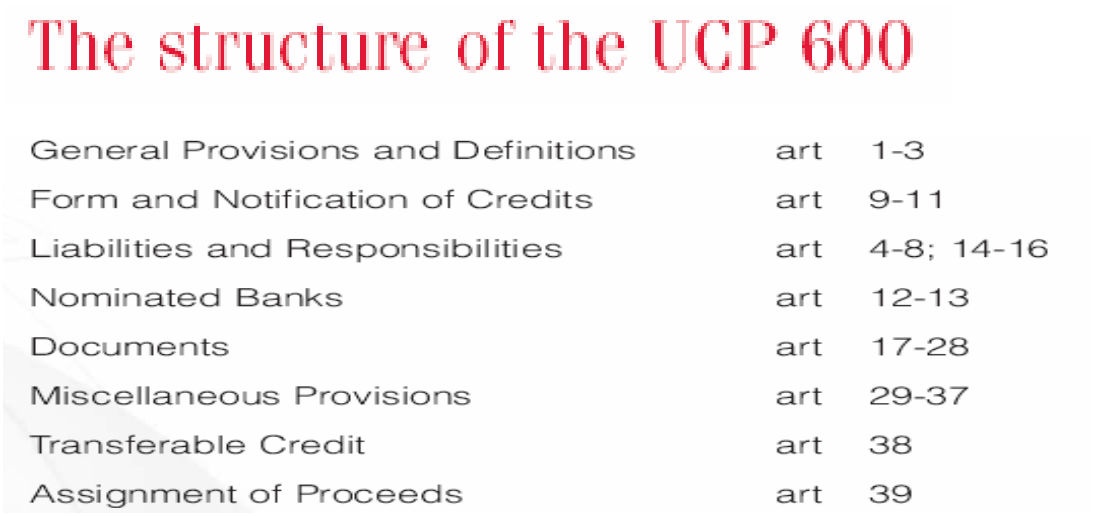
The principle of "strict compliance" will be up for analysis in part III, chapter 9 and chapter 10. And the analysis include leading court cases which lay down the international principles and gives the law firms and other trade finance practitioners a more precise indication of how to interpret the UCP rules. The depth analyze involves different disputes, the court decisions based on the UCP rules and how to calculate consequential damages as referred to the SGA.

2.2 UCP 600, the new rules applicable 1 July 2007

ICC's new rules on documentary credits, which are used for letter of credit transactions worldwide, were approved by the ICC Commission on Banking Technique and Practice on 25 October 2006. *UCP 600* is the first revision of the rules since 1993 and represents more than three years of work by the commission. The implementation date is 1 July 2007.

UCP 600 contains significant changes to the existing rules, including:

1. A reduction in the number of articles from 49 to 39 (manly document, see articles 17-28)
2. New articles on "Definitions" and "Interpretations" providing more clarity (see articles 1-3)
3. The banks are only allowed to examine documents for maximum five banking days.

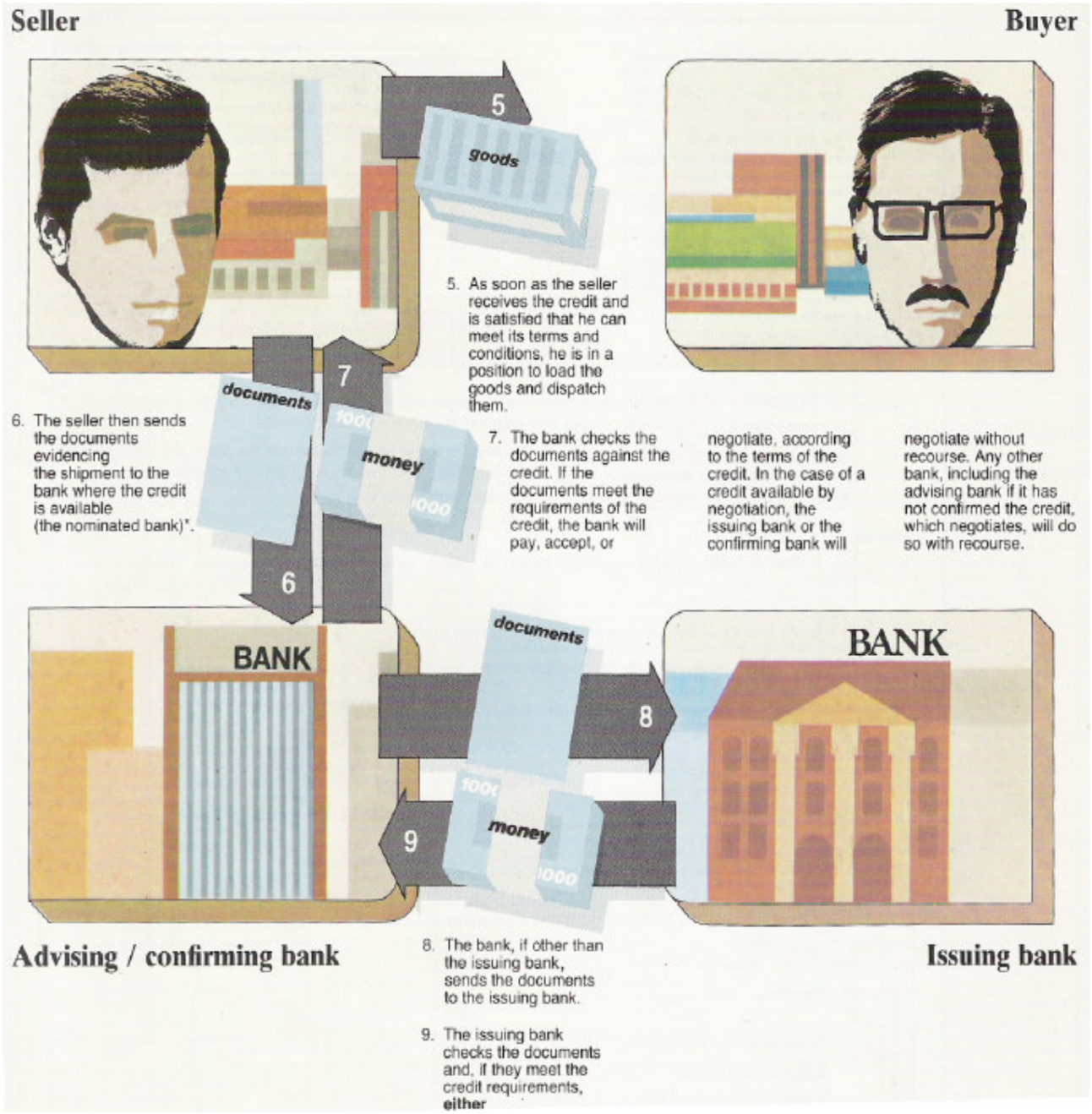


Source: http://www.reedsmith.com/_db/_documents/UCP600__Booklet_Complete.pdf date; May 2007

2.3 Choice of contractual type – revocable or irrevocable?

The letter of credit can be Revocable or Irrevocable ref UCP article 2. If it is irrevocable, the bank is obligated to make payment to the seller if the documents conform. The bank will be obligated to pay even if the buyer argues that the seller has not complied with the terms of the sales agreement.[28] For the seller it is therefore of great importance to require irrevocable letters of credit when entering into a sale contract.

2.4 Presentation of documents required in the L/C contract



[28] Bull/Falkanger, page 258

2.5 Further reading

Leading court cases on letters of credit / Fung, King Ta 658
Rembursrätt / Gorton, Lars 102
Documentary credits : article-by-article, by Raymond Jack, Ali Malek and David Quest
Guide to documentary / International 415. published by ICC
Fellesregler for Remburs (UCP 500) : en norsk utgave
Letters of credit 1988
Transnational commerce onal instruments and com
Case studies on : problems, qu 489
More case studies on : problems, qu 489
ICC Uniform Customs a documentary Credit 500
Rembursretten; Bergen privatbank

CHAPTER 3: CONTENT OF DOCUMENTS – can you provide the documents?

3.1 Introduction

For law firm who gives legal advices on letters of credit contracts, it would be highly recommended to use a checklist of UCP articles. This would especially be recommended as any small discrepant in documents could result in non payment for the L/C beneficiary.

In this thesis, the checklist would primarily be for use in export sales departments, but it would also be of assistance to those involved in financial and credit management and in production and supply. To ensure that a letter of credit is workable, trouble-free and provides security of payment, it is essential to take simple yet effective precautions at the start. Working through the checkpoints set out in the various sections of a list would help reduce discrepancies and associated unplanned costs.

Successive surveys by SITPRO Ltd[29] have shown that well in excess of fifty percent of documents presented by exporters to banks for payment under letters of credit are rejected on first presentation. This can cause expensive delays for both the exporter and the importer and may even result in a lesser payment or no payment at all. A great many of those rejections could be avoided if more care was taken to ensure that the documents called for in the credit are properly completed.

3.2 List of documents used in the Letters of Credit. [30]

The list gives the reader a good overview of all Articles related to documents. (UCP 500 & UCP 600)

Subject Matter	UCP 500	UCP 600
Ambiguity as to the Issuers of Documents	Art 20	Art 3, 17,
Unspecified Issuers or Contents of Documents	Art 21	Art 14
Issuance Date of Documents v. Credits	Art 22	Art 14(i)
Marine/Ocean Bill of Lading	Art 23	Art 20
Non-Negotiable Sea Waybill	Art 24	Art 21
Charter Party Bill of Lading	Art 25	Art 22
Multimodal Transport Document	Art 26	Art 19
Air Transport Document	Art 27	Art 23
Road, Rail or Inland Waterway Transport Documents	Art 28	Art 24

[29] Sitro Ltd; http://www.sitpro.org.uk/about/index.html (UK's trade facilitation agency)
[30] List of documents, source; http://www.reedsmith.com/_db/_documents/UCP600__Booklet_Complete.pdf (July 2007)

Subject Matter	UCP 500	UCP 600
Courier and Post Receipts	Art 29	Art 29
Transport Documents issued by Freight Forwarders	Art 30	No equivalent
On Deck, Shippers Load and Count, Name of Consignor	Art 31	Art 26
Clean Transport Documents	Art 32	Art 27
Freight Payable/Prepaid Transport Documents 26(c) 33(d).	Art 33	Art 25(b) only is the same as 33(b). Art is the same as
Insurance Documents	Art 34	Art 28
Type of Insurance Cover	Art 35	Art 28
All-Risks Insurance Cover	Art 36	Art 28
Commercial Invoices	Art 37	Art 18

3.3 CAN YOU PROVIDE THE TRANSPORT DOCUMENTS? [31]

3.3.1 UCP 600 Article 27 "Bill of lading and description of goods"

If the buyer requires "clean" bills of lading – and the carrier makes some remarks to the goods - the bank will refuse to make any payment. In other words, the bank can't pay by receiving a discrepant document showing there are some remarks to the goods, especially when the buyer has requested a "clean" bill of lading in the L/C contract. As referred to the rules in the Norwegian Maritime Code section 296, a bill of lading shall contain statement on: "The nature of the goods, including their dangerous properties, the necessary identification marks, the number of packages or pieces and weight or otherwise expressed quantity of goods". This description in the bill of lading needs to be in compliance with the description in the letter of credit contract.

For the L/C beneficiary, the rules associated to UCP 600 Article 27 and the Norwegian Maritime Code section 296[32] amount to major exposure of risk to the seller. When the sale contract expressly specifies that the L/C represents absolute payment the L/C beneficiary may be precluded for any payment, even if the goods have been delivered.[33]

[31] SITRO Ltd, publications; "Letters of credit checklist". Company who gives legal advice on letters of credit.
[32] Explanation of Maritime Code involving section 296 will be up for discussion in chapter 4, more accurate chapter 4.4 "The basic rule regarding basis of liability".
[33] *When the sale contract expressly specify that the L/C represent absolute payment the seller will be precluded for any other payment than through the L/C. This will be up for discussion in chapter 8.2*

When we now know of the risk as explained above, there are also some interesting exceptions to the UCP rules. These exceptions will have an IMPORTANT value for the daily business related to the seller (L/C beneficiary). By interpreting the UCP 600 Article 27, the rule gives an option to permit "Claused" transport documents. For an example could this be a clause stating; "superficial rust on steel are accepted". If this is incorporated in the L/C contract the bank will not be able to withhold the L/C payment.

The next step for the seller (L/C beneficiary) will of course be to convince the buyer (L/C applicant) to include such clause in the L/C contract. This will then be a matter of negotiation, but a solution could be to reduce the price and then be allowed to include clauses in the L/C, such as "superficial rust are accepted". Since these matters usually occur in a late stage, the seller (L/C beneficiary) often comes into trouble by providing a clean B/L document. It would therefore be recommended to start negotiation on "claused B/L document" as soon as possible, and incorporate this when you negotiate the price of the goods.

3.3.2 UCP 600 Article 20 - Marine bill of lading

"Received for carriage" or "received for shipment" documents are not acceptable under UCP600 Article 20, unless specifically stipulated in the credit. The buyer will not be guaranteed that the goods will be shipped if the goods only are received for shipment. The bank will of course refuse such documents. Ref NMC § 294 first paragraph, the carrier shall at the request of the shipper issue a "received for shipment" bill of lading. Only when the bank has a confirmation that the goods are on board the ship and to its destination, the L/C sum will be paid. (More details related to NMC, see chapter 4).

A exception to UCP 600 article 20 could be if the buyer accepts FAS terms (free alongside ship). A bill of lading document containing "received for shipment" will then be accepted by the bank. This is due to the FAS term do not include shipment obligations, only obligations that the goods are stored on the harbor, e.g. alongside ship.

3.3.3 UCP 600 Article 28 Insurance documents

The insurance document required in the L/C contract need to be in compliance with the sum, type, currency etc. Only miner deviations would amount the document to be rejected. As an example, the currency need to be the same as the credit, unless otherwise stipulated in the credit. This would not seem logical for the common people, but the banks are allowed to reject documents on the basis of inconsistency in currency.

3.4 Further reading

Leading court cases on letters of credit / Fung, King Ta 658
Rembursrätt / Gorton, Lars 102
Documentary credits : article-by-article, by Raymond Jack, Ali Malek and David Quest
Guide to documentary / International 415. published by ICC
Fellesregler for Remburs (UCP 500) : en norsk utgave
Letters of credit
Transnational commerce onal instruments and com
Case studies on : problems, qu 489
More case studies on : problems, qu 489
ICC Uniform Customs a documentary Credit 500
Rembursretten; Bergen privatbank

CHAPTER 4: MAIN RULES RELATING TO LIABILITY FOR DAMAGE OF GOODS BY THE NORWEGIAN MARITIME CODE

4.1 Introduction

The relvence to include this chapter is to make the L/C beneficiary and the L/C applicant aware of the transporter ability to limit his liability. For the L/C beneficiary it will be of major importance to know about the transporters rights and the possibilities to make reservations in the B/L. And due to the B/L document is one of the most important document to be presented to the bank, it will therefor be highly relevant to get an overview and understand these rules given by the Norwegian Maritime Code (NMC).

A relevant scenario where the transportation company could be involved in L/C transaction would be if a third party holder of bill of lading (the L/C applicant) find the goods damaged, based on the inconsistency with the bill of lading. When we have this scenario where the transportation company could be liable for damages to the goods, the B/L owner (L/C applicant) would of course try to get some compensation of damages. As refer to NMC section 275, the carrier is liable for negligence with a reversed burden of proof and thereby liable for damages. When this is said, the transporter companies has many other rules that protect them, this could typically be referred to the Haag-Visby rules which consist of limitation rules. For countries that focus on importing goods, this limitation regime might be in conflict with the Hamburg rules. But even though there could be a conflict of interests, the Maritime Code has mainly adopted the limitation regime set out by the Haag-Visby rules, and thereby given the transporter possibility to limit his liability. To explain this concept to a buyer (B), a seller (S) or a manufacture (M) it would of course be quite difficult. But the preparatory work in the Maritime Code indicates that these limitation rules are an absolute necessity to keep the Norwegian shipping business going. One of the arguments is that no shipowner would transport goods by sea without any possibility to limit themselves for cargo damages.

4.2 Who can be sued?[34]

When goods are damaged or lost the cargo owner (L/C applicant) will be affected. The cargo owner may be a shipper, consignee or endorsee. If the cargo owner is the "sender" as defined in the NMC, he must pursue his rights under the underlying contract – the Bill of lading. The bill of lading will also be determinative of the legal relationship between the issuer (carrier) and the bill of lading holder who demands delivery. Thus the bill of lading determines who can be sued. This person may be the owner of the ship undertaking the transport, or it may be someone else, e.g. a time charterer of the vessel. (Further reading, see Innføring i sjørett av Falkanger/Bull).

It is important to note that a cargo owner can sue a carrier for loss or damage to cargo on the basis of ordinary tort rules. Nonetheless, the NMC is designed so that to a considerable extent the contractual rules will be determinative, see NMC § 282. In addition, the party who actually performs the carriage owes an obligation to the goods and the owner of the goods, and may become liable if requisite care is not exercised. See NMC § 286.

[34] Bull/Falkanger, page 265

4.3 Overview of conditions for liability pursuant to NMC § 275[35]

The main rule concerning the carrier's liability is found in the NMC § 275, first paragraph. This imposes liability for damage, loss or delay which is caused by the fault or neglect of the carrier or someone for whom he is responsible. Moreover, the provision establishes that the carrier must prove that he and his servants have acted reasonably. Thus the basic rule is that the carrier is liable for negligence with a reversed burden of proof.

4.4 The basic rule regarding basis of liability[36]

The cargo owner must prove:

A) That the goods have been damaged while in the carrier's custody.
B) That he has suffered economic loss

FOR THE L/C APPLICANT TO PROVIDE PROOF, THIS IS ACHIEVED BY COMPARING THE **CONDITION OF THE GOODS** AS RECEIVED WITH THE DESCRIPTION IN THE **BILL OF LADING**, See NMC § 296.

A bill of lading will contain a description of the goods to be carried. This description, which a buyer may rely on when purchasing the goods, brings an additional type of liability – description liability.

The cargo owner must be aware that the carrier is able to make reservations to the Bills of lading, see NMC § 298. Further discussion could be referred to chapter 3.3.1 "UCP 600 Article 27 - Bill of lading and description of goods**"** The problem of indemnify clauses and carriers right to make reservation in B/L might also have an impact on the cargo insurance, see chapter 6 "Insurance for damage, loss or delay of goods" for further discussion.

How strict is the carrier liability? When a third party has acquired the bill of lading in good faith relying on the accuracy of the statement on it, then the evidence on the contrary shall not be admissible. See NMC § 299 third paragraph

If the carrier gives a misleading information in the Bills of Lading he might also lose the right to limitation of liability, see NMC § 300. In relation to L/C transactions there has been many attempts from the seller to forge documents such as the B/L document. So if the seller is negligence by forgery, the transporter will of course be protected, see NMC § 301.

[35] Bull/Falkanger, page 265
[36] Bull/Falkanger, page 266 to 270

4.5 Standardized loss rule in NMC § 279[37]

The Norwegian Maritime Code is also based on the principle that economic loss must be compensated, but the Code operates a system of standardized damages, see NMC § 279.

4.6 The unit limitation rules in NMC §§ 280-281

The Norwegian Maritime Code §§ 280 and 281 contain important practical rules on limitation of a different type. In a normal case, liability will not exceed a fixed amount per unit or kilogram of cargo.

4.7 Further reading

Forarbeider til sjøloven
Selvig, Fra kjøpsrettens og transportrettens grenseland (1975).
Todd, Bills of lading and bankers' Documentary Credits (4th ed. London 2003)
Innføring I sjørett; Falkanger/Bull

[37] Bull/Falkanger, page 287

CHAPTER 5: CALCULATING OF DAMAGES BY BREACH OF THE SALE & L/C CONTRACT

5.1 Introduction

This chapter will give a more precise indication of how the trade finance practitioners could calculate contractual damages where we have a breach of the L/C contract and or the sale contract.

Chapter 5.2 will give an overview of the Norwegian source of law when calculating damages in L/C disputes. The main issue is that the UCP have no rules for calculation of damages, and this need to be based on the Norwegian Sale of Goods Act. Chapter 5.3 gives an example for calculating damages when the confirming bank illegally retains the L/C sum. A more thorough analysis on calculation of damages will be given in the thesis chapter 10.

Finally, chapter 5.4 will explain important principles of English Law, especially related to lost profit, use of exclusion clauses and remoteness of damages. All these topics will be of high relevance related to calculation of damages, e.g. lost profit or other consequential damages.

5.2 Source of law when calculating damages in the sale & L/C contract

As previous discussed with Lars Gorton, we need to take into consideration the sales of goods act (SGA) when we shall calculate damages. This is based on the fact that UCP soft laws have no rules of how to calculate damages by a L/C contract. The soft law has neither any limitation rules, which could reduce the parties' responsibility. So if we have a breach of the L/C contract the calculation of damages will be based on the Norwegian Sales of Goods Act. Other relevant sources of law will be the Norwegian Contract Act, the Norwegian Tort Act and The Norwegian Act relating to compensation in certain circumstances.

As regard to carriers liability under the B/L - the thesis has no room of going into a legal analysis - but applicable law could be referred to the thesis chapter 4. For a further discussion on the issue, see particularly Selvig, Fra kjøpsrettens og transportrettens grenseland (1975). See also Todd, Bills of lading and bankers' Documentary Credits (4th ed. London 2003)

5.3 Calculation of damages - if the confirming bank illegally retains the L/C sum[38]

When we have a situation of negligence – if the confirming bank illegally retains the L/C sum - the most important question for the trade finance practitioners will be how to calculate contractual damages.

By illustrating this with an example, the question of how to calculate damages could be referred to the case; "**Ozalid Group Ltd v African Continental Bank Ltd.**"[39] In the case from 1977, the L/C beneficiary sued the bank for 2 months late payment. The claim included currency loss, interest loss of £ 2.987 and £ 40 for legal expenses.

[38] GORTON, Rembursrett 1980 page 338

[39] Ozalid Group Ltd v African Continental Bank Ltd. (1979) 2 Lloyd's Rep 231.

Full details on the case can be found in Lloyd's Rep 231, but the main principles are set out in the famous speech of Lord Denning in the case Trans Trust SPRL v Danubian Trading Co Ltd (1952) 1 Lloyds's Rep 348. The main rule is that the L/C beneficiaries shall be entitled to all damages as a consequence for the bank negligence. This means that damages are not limited to interest loss, but include consequential damages e.g. legal expenses, currency loss, lost profit, lost contracts, lost income, etc.

For the Norwegian Law, there have been a Nordic Seminar in September 1976 regarding calculation of damages in L/C contracts, but this seminar does not provide any indication of how to calculate damages. By quoting Lars Gorton in his book Rembursrett;[40] "The Nordic doctrine most probable will adopt the principles that damages is not limited to interests, but include all damages" To interpret what Gorton means by all damages, leaves the door open to include all consequential damages in relation to the bank negligence. In other words, damages for the bankers account will not be limited to interest and legal expenses. Further analysis on the topic related to available remedies is to be found in chapter 5.4.1 and chapter 10.

5.4 English Law of Contract – and how these rules affect the calculation of damages

The general principle for calculating contractual damages are stated in the case *Robinson v Herman,*[41] and the contractual approach is described as protecting the claimant's "expectation interest". This means that the claimant can recover for lost profits on the transaction, as well as consequential losses following the breach. Partial recovery for lost profits may be given even if they were not certain to be made. As illustrated in the case *Simpson v London and North West Rly Co*[42], the plaintiff had contracted for some specimens to be delivered to a trade exhibition by a specific date. They arrived late, and the plaintiff was allowed to recover damages for the lost profits on sales he might have made had the specimens arrived on time.

The claimant will not necessarily recover, however, every loss which, as a matter of fact, flows from the breach by the defendant. The rules of remoteness, mitigation and contributory negligence act as controls over the amount of damages. To the extent to which they operate, the claimant need to be put back in the economic position he would have been in had the contract been performed satisfactorily.

5.4.1 Rules related to lost profit [43]

The basic rule of recovery compensation in the case of contract is that the non-breaching party is to put into the position he/she would have been in had the contract been performed as first agreed. Further explanation of the English principles can be referred to the case; *Robinson v Herman (1848)*[44], and the more recent case *Surrey Country Council v Bredero Homes Ltd (1993).* [45]

[40] GORTON, Rembursrett 1980 page 339
[41] *Robinson v Herman (1848) 1 Ex 850 ... 410*
[42] *Simpson v London and North West Rly Co (1876)*
[43] English Law of Contract page 411
[44] *Robinson v Herman (1848) 1 Ex 850* ... English Law of Contract *page 410*
[45] Surrey Country Council v Bredero Homes Ltd (1993)

Damages to compensate for lost profit seek to protect the expectation of performance in the contract. However, in order to achieve this compensation it is necessary to identify the expectation which has been lost and then to quantify it.

Expectation loss will normally be compensated on the basis of difference in value measure, i.e., the difference in value between the promised performance and the actual performance. Difference in value damages will be calculated using the "market price" rule. Alternatively, in some circumstances, it may be possible to recover the cost of achieving the expected performance. The English courts will generally use the most appropriated method by either assessing the value or calculate the lost profit of expected performance. But for lawyers, it will be most difficult to predict which calculation method the court adopts.

By defective performance a claimant buyer (L/C applicant) will most probably seek to be compensated for its lost expectation through the defective performance, which normally will be represented by the difference in value of the goods and what is actually delivered. But here again, the estimation of warranted values may be somewhat speculative. An exception to this could be if we have the scenario where the buyer (L/C applicant) receives defective goods, but the re-sale gives no real loss. See the Court of Appeal case; *Bence Graphics International Ltd v Fasson (UK) Ltd (1998).*[46] The principles set out in this case establish that any damages should be calculated by loss directly or loss naturally arising, which especially could be referred to in resale of goods.

For a L/C perspective where the L/C beneficiary already has received the payment for defective goods, the buyer (L/C applicant) could be in a most difficult situation. Because the L/C contracts are based on documents and not goods, the buyer (L/C applicant) needs to investigate how it was possible for the bank to pay the L/C beneficiary. The investigation could start by checking any negligence from the bank side, as to not examine the documents properly. This could especially be of relevance if the examined documents included a certificate of inspection which clearly state that the goods were defective. Any negligence by the bank in accepting discrepant inspection document would entitle the buyer (L/C applicant) to claim compensations.

On the other hand, the investigation could give a totally different result. As an example, there could be a forgery of document by the manufacture of goods (second L/C beneficiary), or maybe damages to the goods from the transportation company. The bill of lading will show the goods conditions, which then easily could be check by the buyer (L/C applicant). And if we have a situation where the transportation company is to blame, the rules applicable will be the Norwegian Maritime Code, see thesis chapter 4 for further discussion. The Code also include rules regarding negligence by the manufacture, so called Guarantee by the shipper. See NMC § 301.

As soon any investigation has been finalized, the buyer need to forward his calculated claim to the negligent party. And if the disputes goes to court - with English law applicable - the principles discussed above seems to favor the claimant, which entitle full compensation, including lost profit.

[46] Bence Graphics International Ltd v Fasson (UK) Ltd (1998)

Late delivery where the delay in delivery constitutes a repudiator breach and the buyer rejects the goods for this reason; damages are assessed as if the breach constituted non-delivery (English SGA 1979 section 51(3)). However, where the delay in delivery does not constitute a repudiator breach, the measure of damages will differ depending upon the intended purpose of the goods. For a manufacture the lost expectation would be the profit lost during the period when the machinery should have been in operation. Where the intentions are to sell the goods in the secondary market, the loss would be the difference in market price at expected delivery date compared to the market price at actual delivery date.

Under a L/C perspective, a late delivery of documents to the bank would amount to no payment at all for the L/C beneficiary. The only chance for the L/C beneficiary is to claim the contract sum directly from the Buyer (B). But, this could also amount to problems, especially if the sale contract stipulates that LC represented "absolute payment". If there is such expression, the court would regard the payment to be non conditional, and the primary liability to pay under the sales contract will be disregarded. Further analyses see; Part III, Chapter 8.1 "Credit vs. contracts". The case establish the principles where the seller (S) or the manufacture (M) would be precluded for claiming payment directly from the sale contact.

For the L/C applicant - who could be a manufacture - any late delivery of the ordered goods or equipment might amount in enormous claims. This could especially be illustrated by a intended purpose of re-sale to third parties or when machinery and production shut downs due to the goods or equipment are not delivered on time.

5.4.2 Rules related to exclusion clauses

For the trade finance practitioners - especially law firms who advice on contract writing - it is vital to have a good understanding of the legal regulation of "substantive unfairness" in contracts, when the applicable law is English.

By quoting the English author and Professor Jill Pole; "The English common law provides "NO RULE" or doctrine whereby an exemption clause may be declared unenforceable on the ground that it is unfair or unreasonable".[47] By noting this quote - the Norwegians and others who comes from a similar legal system - should be very careful of which exception clauses that are used in contracts when the applicable law is English. Clauses used to limit responsibility are often referred to "liquidated damages". And before you sign any contract, it will be important to check if the other party has include a unfair and unreasonable exclusion clause that leaves you with all the risk.

Clauses which purport to exclude or to limit liability for breach of contract are the most common form of what are referred to when the lawyers talk about "exclusion clauses". It is important to note, however, that exception clauses come in many different forms. The applicable rules remain generally the same. Exception clauses are

[47] English Law of Contract, page 195

an important feature of modern contracts, and in recent years have been the focus of much judicial, legislative, and academic attention.[48]

Most common exception clauses are the clauses purporting to exclude liability completely for part at least of what would otherwise be included in the contractual undertaking (e.g., excluding liability or consequential losses, and those clauses limiting liability to a particular sum (e.g., the price payable under the contract). Other common forms are those which limit the remedy available either by imposing a short time-limit during which claims for breach must be made (warranty period), or by imposing onerous conditions on obtaining the remedy (such as payment of costs of transport of defective goods to and from supplier's place of business).

It would be strongly recommended to use exclusion clauses limiting liability to a particular sum. This clause should then also include all consequential loss that might occur. A L/C beneficiary could then use the following wording, as shown below:

"The total accumulated Liability arising out of or in connection with this Contract or its performance, breach or termination and whether based on contract, tort, fundamental breach or otherwise, including obligations to indemnify and hold harmless, is limited to one hundred percent (100%) of the Contract Price in the aggregate".

The generally accepted view is that exception clauses may operate as a defense to the liability which would otherwise exist. Further discussion as regarded to the accepted view of exception clauses, see Yates, Exclusion Clauses in Contracts. [49]

5.4.3 Rules related to remoteness of damages

Regarding the English rules of remoteness of damage the defendant is not liable for all losses which result from the breach of contract. Some losses are too remote a consequence of the breach to be recoverable, in the sense that they are regarded as too improbable and therefore not within the scope of the contractual responsibility undertaken.

The remoteness rule in contract is therefore designed to prevent the defendant having to compensate a loss attendant upon a risk which was not his to bear. In the case Hadley v Baxendale (1854) it was said that damages too remote from the contract is not for the defendant to bear. [50]

This rule, which is the test of the remoteness of damage, is intended to ensure that the defendant was aware when making the contract that he had to avoid causing the kind of loss which occurred. If a party knows that it must bear the risk of losses occurring, that party can take preventative actions with the aim of avoiding that loss. By knowing this, the party may also reduce the risk by taking out an appropriate insurance.

In practice, it is therefore important that the plaintiff informs the contractual party of all the risk he/she is to bear on his/her account, especially risk which could be up for discussion. For example it is common for an insurance company to name all the perils

[48] English Law of Contract page 196
[49] Exclusion Clauses in Contracts 2nd edn., Sweet & Maxwell. 1992 pp. 123-133
[50] Hadley v Baxendale (1854); English Law of Contract page 433

at risk. By doing so it is easier to calculate the premium. This principle may also be used in contracts, and would be a good tool for the parties to use. On the other side this could be a disadvantage for the plaintiff where only few listed perils are for the defendants account and all the unforeseen damages are for the plaintiffs account.

It is up to the parties to decide the terms of the contract, and to reduce the hardship to the plaintiff in respect of damages, the contract could be based on exhaustive peril clauses.

5.5 Further reading

Fra kjøpsrettens og transportrettens grenseland / Selvig
Case studies on Documentary Credit / Jan Dekker (1989)
More case studies on Documentary Credit / Jan Dekker (1991)
Leading Court cases on letters of Credit / King Fung (2006)
Hellner I TfR 1966 page 299 ff
Gutteridge & Megrah page 184 ff
Stoufflet, op cit page 358 f.
Liesecke I WM 1960 page 211
Lord Denning speech in the case Trans Trust SPRL v Danubian Trading Co Ltd (1952) 1 Lloyds's Rep 348
Belgian Grain & Produce Co Ltd v Cox & Co Ltds (1998) 1 L1 L R 256.
Stein v Hambro's Bank (1921) 9 L1 L R 433
Davis, The law relating to commercial letters of credit page 122 ff
Gutteridge & Megrah page 193 ff and page 60 f.
Urquhart Lindsay & Co Ltd v Eastern Bank Ltd (1922) 1 K B 318
Davis, op cit page 124 ff.
White and Carter Ltd v McGregor (1962) A C 413
Anglo African Co of New York Inc v J Mortner Ltd (1962) 1 Lloyds Rep 81 (Q B) 1 Lloyds Rep 610 (C A)
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Foglino & Co v Webster 244 N Y 516 (1926)
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In re Barned's Banking Co Coupland's Claim (1869) L R 5 Eq 167
Textbook on contract law / Jill Poole, 7th edition 2004
Contract Law / Richard Stone, 5the edition 2004
Contract in a Nutshell
Lærebok i erstatnings / Lødrup, Peter
Avtalerett / Woxholth, Geir
International handels / Iversen, Bent

CHAPTER 6: INSURANCE FOR DAMAGE OF GOODS

6.1 Introduction

As the carrier has possibilities to limit his liability – referred to rules in chapter 4 - it would be most important to set up a cargo insurance which secure a cargo claim.[51]

One interesting discussion could be how a too secures the L/C beneficiary in CIF trades - with the possibility to pay a unknown B/L holder directly – and then involve the insurance company to recourse the cargo claim against the negligent party. These kinds of issues will not be up for discussion in this thesis, but it is recommended to contact a cargo insurance company which of course are experts on the subject, and also could give a better answer of the costs included. Typically marine insurance companies which offer cargo insurance will not be Gard and Skuld which mostly focus on hull machinery insurance. So the L/C beneficiary need to contact other insurance companies as IF or GIEK.

6.2 The Norwegian cargo clauses: Cargo clause § 54

The importance of assureds duty to maintain and secure the claim is referred to the Norwegian Cargo Clause § 54. Full text of the relevant law is shown below.

For the L/C beneficiary, it is important to not indemnify the transporter company for any cargo damage, which then could result in the situation where the insurance company would be precluded from recourse the claim. If the L/C beneficiary indemnify the transporters, he might be liable for not securing the claim, ref cargo clause § 54.

§ 54. The Assured's duty to maintain and secure the claim

The Assured must take any steps necessary to maintain and secure the claim until the Insurer himself can attend to his interests. If necessary, the Assured shall avail himself of expert technical and legal assistance.

If the Assured wilfully or through gross negligence fails to fulfil his duties pursuant to the preceding paragraph, he shall be liable for any loss suffered by the Insurer on account of such failure. In the case of national transits, however, the limitations of § 4-10 of the Insurance Contracts Act shall apply.

The Insurer's liability shall be reduced by an amount equal to that which he is precluded from collecting as a result of the Assured having waived the right to claim compensation from a third party, if such waiver cannot be deemed customary.

[51] Vareforsikring / Johansson, O. Svante

6.3 Further reading

Elements of Cargo Ins / Badger, Dennis
Varuförsäkringsrätt : / Johansson, Svante O

CHAPTER 7: CLOSING WORK TO CONCLUDE THE SALE & L/C CONTRACT

7.1 Introduction

When a seller (S) and a buyer (B) try to conclude a sale contracts - time is of essence - and it could be recommended to have a checking list for all the most important terms and conditions before signing any sale contract. Usually the banks are not involved in negotiation for a sale contract, and therefore all responsibility lie's with the seller (S) to include the terms and conditions, which then after words are to be put into the L/C contract. As an example this could this be a sale contract with supply of aluminum, where the sale contract stipulates the percentage of aluminum, such as 98% grade. If the bank receives a document saying that the aluminum grade is only 91%, this would amount in dismissal and no payment.

Many L/C beneficiaries have accepted terms and conditions in the sale contract which turn up to be impossible to match with the demands in the L/C contract. This could especially be referred to "*Claused*" transport documents vs. "*Clean*" transport documents". see chapter 3.1.1 for further explanation. If the bank receives a bill of lading with some remarks - as damage of goods - this document would be rejected. In other words - there is a major risk if the ship captain makes some remarks to the B/L document - which then is not taken into account for in the L/C contract. Also, the L/C contract is often based on irrevocable terms, which then gives no room for alterations. Further explanation is to be found in chapter 2.3. If the L/C is irrevocable, any new text would be rejected by the bank. This will then result in no payment to the seller (S), which of course would be an enormous risk, especially if the seller (S) has waived his right to other form of payment in the sale contract.

The problem regarding damage of goods, is not an un-normal problem, on the other hand it is quite normal that the ship captain make some remarks in the bill of lading. This is often done to protect the transporter company against any cargo claims, as the martime code gives the possibility to make certain reservation. Further explanation, see chapter 4.4. In these circumstances, the L/C beneficiary must be aware of the risk and include the sale contract with all possible risks that might occur. After identifying the potential risks, this will of course need to be accepted by the buyer, who has the final say. The main problem will be to negotiate with the buyer that there for example could be some superficial rust on the aluminum bars and get him to accept this in the sale contract. Without any acceptance of this clause, there will be a major risk for the L/C beneficiary, which then send away the goods, but do not get paid as the bank will by certainty reject the bill of lading document.

7.2 TERMS & CONDITIONS FOR NEGOTIATION RELATED TO THE L/C - UCP

7.2.1 Negotiations for payment and use of transferable credit, ref UCP 600 art 38

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If a manufacture (M) require payment as soon he has delivered the goods, the use of transferable L/C might be a good solution for the seller (S). If the buyer issue a transferable credit, the seller (S) could then easily transfer the same L/C to the manufacture (M) and use this as a payment, instead of paying him by cash. To get this concept working in real business life, the main job for a seller (S) would of course be to negotiate such a credit.

7.2.2 Negotiations for the use of revocable or irrevocable credit, ref UCP 600 art 2

For the seller (S) it is important that the buyer (B) can not revoke the credit after providing valid documents to the bank, see previous explanation in chapter 2.3. So it will be vital to negotiate that the L/C need to be irrevocable.

7.2.3 Negotiations for "Claused" transport documents ref UCP 600 Article 27

It will be importance for the L/C beneficiary to include "Claused" transport documents, in the L/C contract. The credit must state which clauses are acceptable, such as superficial rust on aluminum bars.
Further explanation, see chapter 3.3.1.

7.2.4 Negotiations for bill of lading contents ref UCP 600 Article 20.

If the buyer (B) accepts FAS terms (free alongside ship), a bill of lading document containing "received for shipment" will be accepted by the bank. This clause could be important for the seller (S) if he use a manufacture (M) which require payment as soon he deliver the goods at the harbor.

If the L/C contract is based on FOB terms, the wording "received for shipment" will not be accepted by the bank. This could be quite confusing, but the UCP rules are particular sensitive on this subject. So if the wording "received for shipment" should be used, this must expressly by stipulated in the L/C.
Further explanation, see chapter 3.3.2.

7.2.5 Negotiation for which type of insurance to use, ref UCP 600 Article 28

First of all, the insurance document in the L/C needs to be in compliance with the request of the buyer (B). It will be important to have in mind the difficulties of covering a "all risk insurance" ref UCP art 28, if this is stipulated in the L/C.
Further info, see chapter 3.3.3.

7.3 TERMS & CONDITIONS FOR NEGOTIATION RELATED TO THE SALE CONTRACT - INCOTERM

7.3.1 Choice of contractual type based on INCOTERM

These negotiations fully depends on the contracting parties demands, but it would be help full to use the INCOTERM chart which can be found on the ICC webpage; (http://www.iccwbo.org/incoterms/wallchart/wallchart.pdf)

7.3.2 Force majeure: UCP 600 article 36

It is importance to include clause of unforeseen problems, as related to supplier non performance of delivering goods, cargo surveyor report, strike, other delay problems etc.

We all know that is not possible to predict a act of god or a strike from labors, so it would be recommended for the seller to include as much events as possible. With the new rules applicable by UCP 600, the bank will still disregard any force majeure event and stick to the expire date of presenting valid documents.

7.3.3 Clauses related to discharge or breach of the sale contract

A) **Sharing of cost related to issuing letters of credit**

If both parties agree to discharge the contract, it could be smart to include a clause in the sale contract which establish who to pay for the L/C costs. This is especially recommended for the seller, if he does not wish to come into quarrel with his client, and ruin future business relations.

B) **Liquidated damages**

The concept of liquidated damages could be of great interest to negotiate. This could especially be illustrated if there are some delays in the shipment. In these type of scenarios the L/C beneficiary may reduce his potential risk by paying a agreed sum instead of being sued.

Also, the concept of liquidated damages could be used in other scenarios, and the main issue for the parties is to reduce its risk or predict the cost of any breach.

C) **Warranty clauses**

It would be strongly recommended to use exclusion clauses limiting liability to a particular sum. As a example 100% of the contract sum. Such a clause should then also include all consequential loss which consist of damages related to lost production or any other related loss that might occur. Example given below;

"The total accumulated Liability arising out of or in connection with this Contract or its performance, breach or termination and whether based on contract, tort, fundamental breach or otherwise, including obligations to indemnify and hold harmless, is limited to one hundred percent (100%) of the Contract Price in the aggregate".

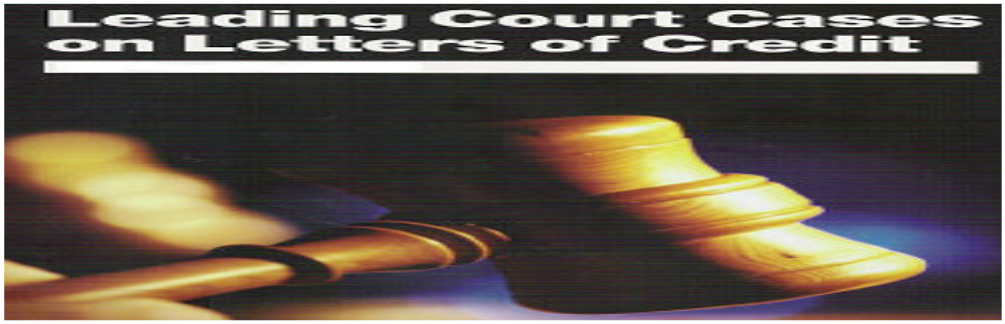
7.3.4 Clauses related to jurisdiction and choice of law

For the Norwegians it would of course be in their best interest to use Norwegian law. When this is said you must be good to negotiate if you get an Asian company to accept the use of Norwegian law. The most common law in shipping and offshore is English law, and therefore it will be of great importance to know about the English legal system for those who wants to do business involving L/C contracts.

7.4 Further reading

Case studies on Documentary Credit / Jan Dekker (1989)
More case studies on Documentary Credit / Jan Dekker (1991)
Leading Court cases on letters of Credit / King Fung (2006)
Hellner I TfR 1966 page 299 ff
Gutteridge & Megrah page 184 ff
Stoufflet, op cit page 358 f.
Liesecke I WM 1960 page 211
Lord Denning speech in the case Trans Trust SPRL v Danubian Trading Co Ltd (1952) 1 Lloyds's Rep 348
Belgian Grain & Produce Co Ltd v Cox & Co Ltds (1998) 1 L1 L R 256.
Stein v Hambro's Bank (1921) 9 L1 L R 433
Davis, The law relating to commercial letters of credit page 122 ff
Gutteridge & Megrah page 193 ff and page 60 f.
Urquhart Lindsay & Co Ltd v Eastern Bank Ltd (1922) 1 K B 318
Davis, op cit page 124 ff.
White and Carter Ltd v McGregor (1962) A C 413
Anglo African Co of New York Inc v J Mortner Ltd (1962) 1 Lloyds Rep 81 (Q B) 1 Lloyds Rep 610 (C A)
Moers v Den Norske Handelsbank 180 N Y S 743 (1920)
Foglino & Co v Webster 244 N Y 516 (1926)
De Sousa v Crocker First National bank 23 F 2d 118 (N D Cal 1927)
In re Barned's Banking Co Coupland's Claim (1869) L R 5 Eq 167
Textbook on contract law / Jill Poole, 7th edition 2004
Contract Law / Richard Stone, 5the edition 2004
Contract in a Nutshell
Lærebok i erstatnings / Lødrup, Peter
Avtalerett / Woxholth, Geir
International handels / Iversen, Bent
Elements of Cargo Ins / Badger, Dennis
Varuförsäkringsrätt : / Johansson, Svante O
Forarbeider til sjøloven
Selvig, Fra kjøpsrettens og transportrettens grenseland (1975).
Todd, Bills of lading and bankers' Documentary Credits (4th ed. London 2003)
Innføring I sjørett; Falkanger/Bull

PART III – LEADING COURT CASES ON LETTERS OF CREDIT



CHAPTER 8: IMPORTANT TERMS & CONDITIONS IN THE SALE CONTRACT, THE L/C CONTRACT AND THE TRANSPORTATION CONTRACT

8.1 Introduction

Minimization of potential risk will be the most important role for the trade finance practitioners dealing with L/C contracts, and this could particularly be illustrated with the high risks for the L/C beneficiary which could amount to loss of hundreds of million dollars.[52] Such enormous loss could be based on only minor default, as an example where the L/C beneficiary waive his rights or accept impossible terms in the sale contract.

This chapter includes leading court cases on L/C disputes which explaining the requisite interaction between the Incoterm contract and the L/C contract. This will typically be when the sale contract stipulates that the buyer need to secure the payment through a guarantee, such as an L/C. Other important terms and conditions will be based on the transportation contract, and the need to provide a satisfied marine bill of lading.

Since shipping is an international business, it could be difficult for the Nordic countries to go another path than the principles and rules developed by ICC, which reflect the international standards. If Norway should try to over rule the principles set out in other international cases, the defendant most probable would try to get a dismissal of the ruling. Choice of jurisdiction and choice of law will not be a topic for discussion in this thesis, but the L/C beneficiary need to know about the risks which are involved, especially related to choice of law.

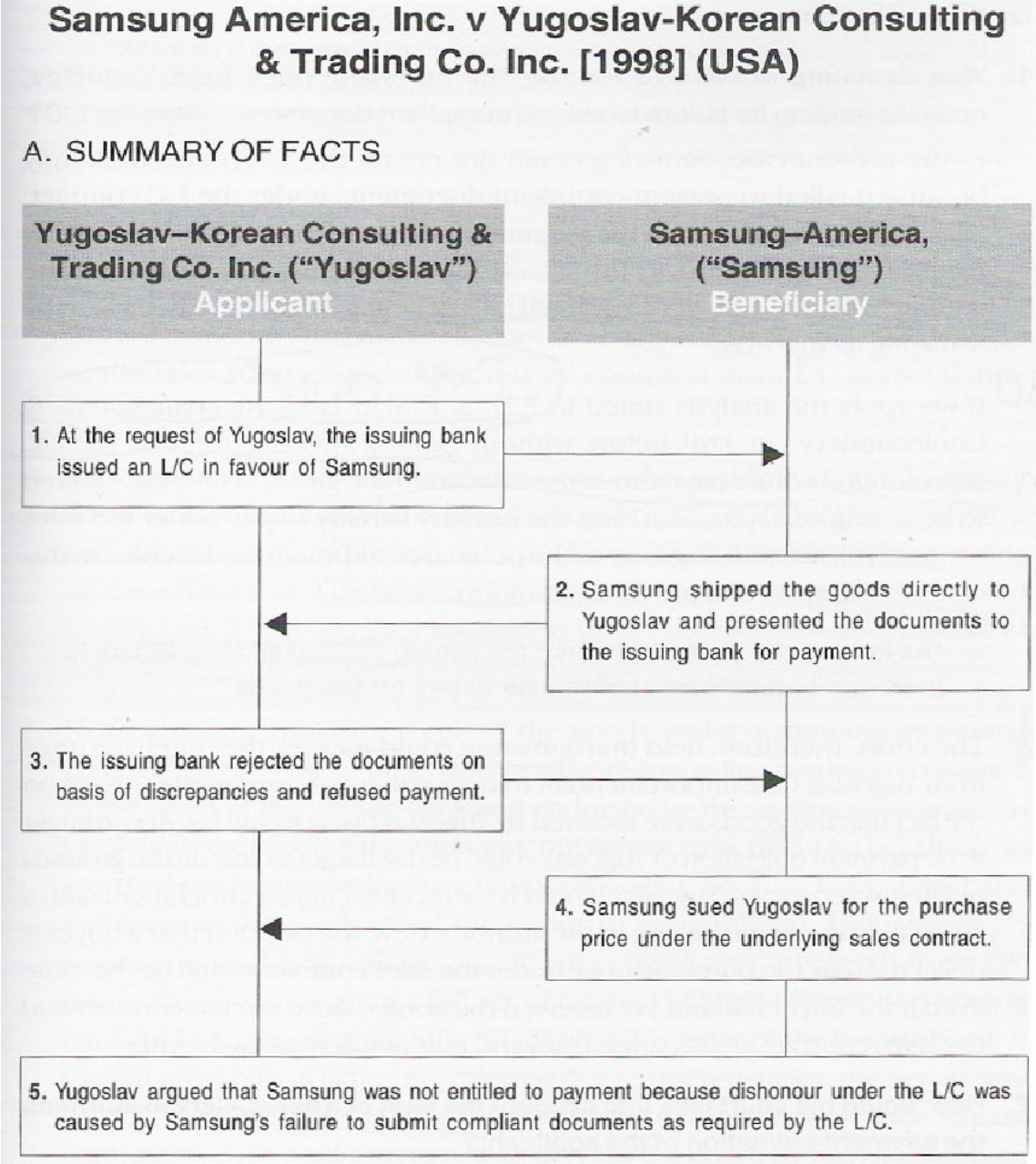
Chapter 8 is structured with the following problems;
- **Chapter 8.2**; Credits versus contracts, (how does the sale contract affect the L/C contract)
- **Chapter 8.3**; Marine Bills of Lading, (which content of B/L's are accepted)

[52] Leading Court Cases (last page)

8.2 Credits versus contracts[53] - how does the sale contract affect the L/C contract

An L/C transaction can involve up to seven contracts among the relevant parties. These contracts may appear to be closely related to each other, but UCP Article 3 clearly states that an L/C contract is separate from sales and other contracts. In this chapter we will get an answer if the seller is entitled to claim the purchase price from the buyer under the sales contract, if he fails to submit document(s) as requested in the L/C.

The answer to this problem is given by the leading case from USA 1998; Samsung America v Yuogoslav-Korean Consulting & Trading.



[53] Leading Court Cases page 17

In the present case, Samsung could not obtain the LC proceeds simply because it failed to present compliant documents under the LC contract, but the court still gave the beneficiary right to claim the money under the sale contract. There could be given a thorough explanation of this, but the important point to note is that the court put emphasis on the fact that the goods were received by Yugoslav but not paid for. When we know how the court will handle such disputes as mention, there will be another problem that is of much more interest to interpret, such as exceptions to this court decision.

For practitioners to minimize their risk there are some important exceptions to the principles given in the case above. The parties must take into consideration if it was **express specification that the LC represented "absolute payment" to the sales contract**, which was stated in the English case E.D. F. Man Ltd v Nigerian Sweets. If there is such expression, the court would regard the payment to be non conditional, and the primary liability to pay under the sales contract will be disregarded.

Principles given in the English case "E.D. F. Man Ltd v Nigerian Sweets" clearly give an extreme exposure for the seller or the manufacture who are not able to present valid documents. On the other hand it will be of great important for the bank to get correct documents before they release the payment to the L/C beneficiary.

The wording "absolute payment" in these L/C circumstances has not been tested in the Scandinavian legal system, and it could be interesting to see if the Nordic countries follow the English ruling in the E.D. F. Man Ltd v Nigerian Sweets.

8.3 Marine Bills of Lading[54] - which content of B/L's are accepted

Article 23 is one of the UCP500 articles that have been subject of a number of ICC Banking Commission Opinions. There are two most relevant cases for the practitioners who will be analyzed further, and the first case gives the answer if it is essential for the wording "carrier" to appear on the face of a bill of lading to satisfy Article 23? The second case gives an answer if a bank can reject the L/C when a shipped on board bill of lading shows both an "on board date" and an "issuance date"?

The first problem dealing with the wording "carrier" was tested in Hong Kong 1996 by the case Southland Rubber Ltd v bank of China.

In early Nov 1995, Bank of China issued an L/C for Nan Shing Development Ltd in favor of Southland for the shipment of natural rubber from Thailand to China. Southland then presented documents as required under the terms of the L/C. On 6 Nov 1995 Bank of China faxed a refusal notice to the presenting bank stating the following discrepancies: (1) B/L not showing name of carrier (2) name of stamp chop in "on board notification" differs from the heading and does not show the carriers capacity.

[54] Leading Court Cases page 125

Based on the facts stated in the judgment, part of the relevant bill of lading is reconstructed below.

SHIPPER Southland Rubber Co.	Ref. XXXXX	B/L No. SST-01
CONSIGNEE To order	**P.T. KEMAH NUSASEMESTA** **"Ship Owners, Export-Import, General Contractor"**	
NOTIFY PARTY Nan Shing Development		
OCEAN VESSEL MV. Sarah	PORT OF LOADING Thailand	PORT OF DISCHARGE Shantou, China

SHIPPED ON BOARD PER

{*Signature of XYZ*}

PT. BAHTERA BINTANG SELATAN,UJONG PANDANG

MV. SARAH MASTER
PT. KEMAH NUSASEMESTRA

Sub-Article 23(i) states:
"If a credit calls for a bill of lading covering port to port shipment, banks will, unless otherwise stipulate in the Credit accept a document, however named, which; appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by…."

The judge noted the principle embodied in sub-Article 23 (a)(i);
"One of the fundamental principles in any documentary credit transaction was that of certainty of the identity of the parties to the contract of voyage. To satisfy the requirements of art 23 (a)(i), the name of the carrier must appear as such, so that anything short of using the actual word 'carrier' would not be sufficient to identify the party acting as carrier".

This conclusion was reached due to banks and institutions presented with such a bill must NOT be placed in a position whereby they had to speculate or to make an educated guess of the identity of the carrier.

The second case which gives an answer if a bank can reject the L/C when a shipped on board bill of lading shows both an "on board date" and an "issuance date" are put forward in the most resent decision from South Korea 2001; Chou Hung Bank v Bank of China.

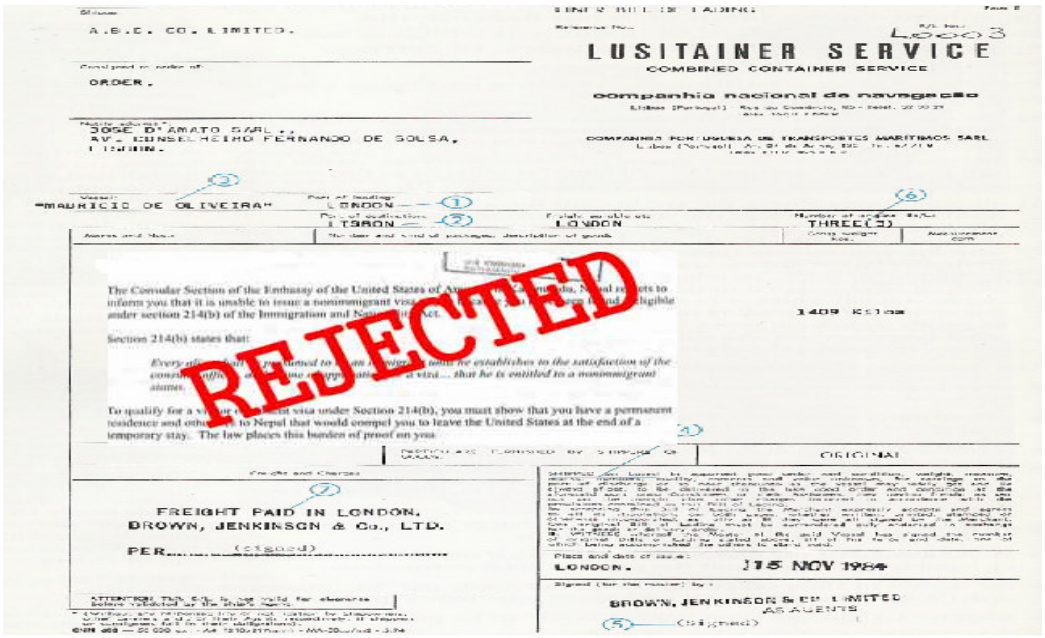
The trial court in South Korea ruled that a shipped bill of lading with two dates was discrepant. Chou Hung Bank did not agree with the decision and appealed.

Sub-Article 23 (a)(i) in 1998 states:
"Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on an named vessel, in which case the "date of issuance" of the bill of lading will be deemed to the date of loading on board and the date of shipment". Since the two dates showed in the

shipped bill of lading were different in this Korean case, it was held that the relevant bill of lading was discrepant.

Due to the heated discussion around the court decision, the ICC changed the UCP Article 23. In circumstances where a pre-printed 'shipped on board' bill of lading is presented which also bears a shipped on board notation with a date which is different than the date of issuance, then the date of the on board notation must be used as the date of shipment. And of course, the bank can not refuse such bill of lading, which gives a more logical perspective of the shipping business.

CHAPTER 9: DOCUMENTS EXAMINATION AND REJECTIONS[55]



9.1 Introduction

Documents examination and rejection is one of the most important topics concerning L/Cs. A majority of the court cases in this area centre on document compliance and wrongful rejections. Examination of the relevant cases will clarify some of the L/C legal principles and can aid practitioners in minimize their potential risk and exposure.

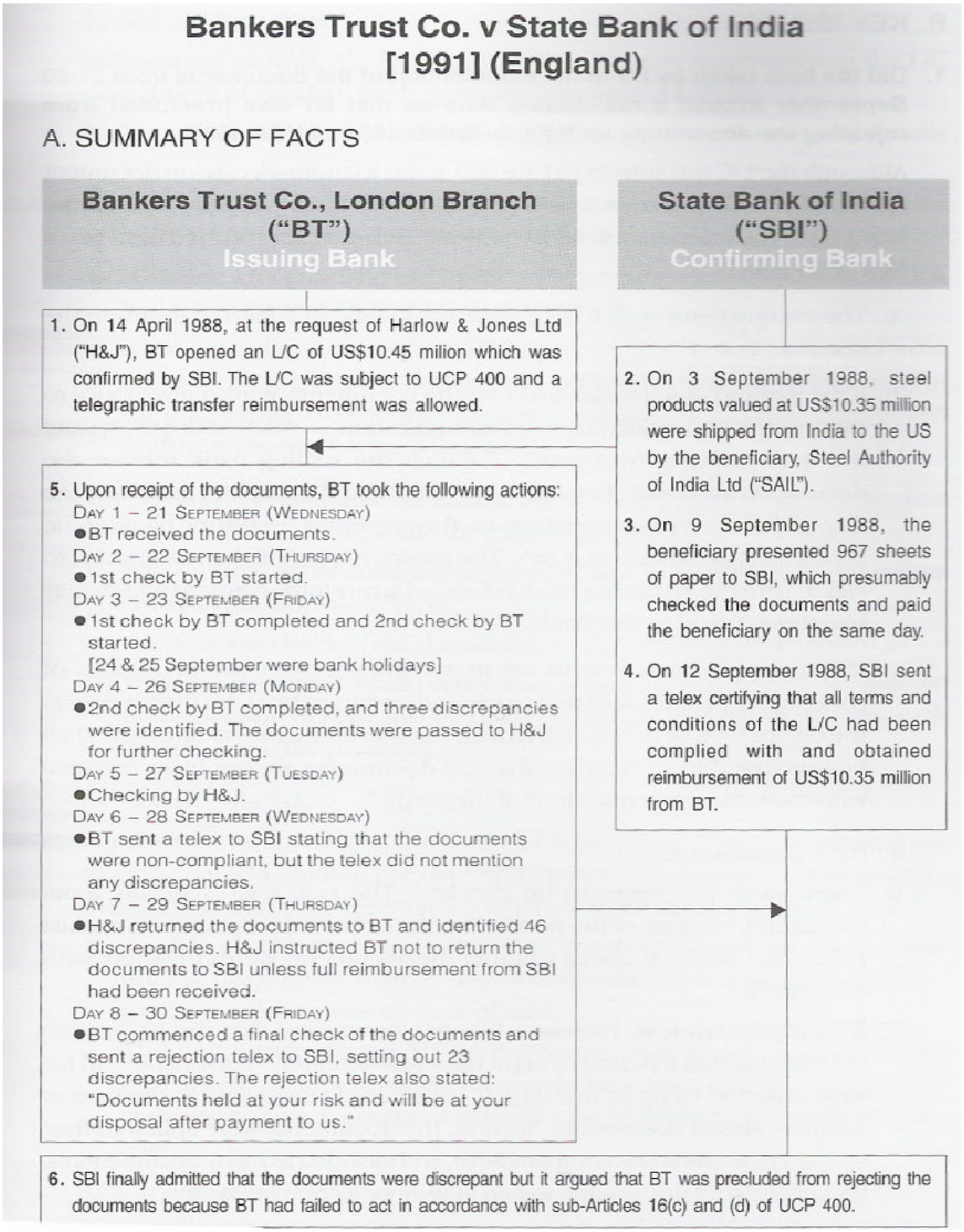
This chapter includes leading court cases on L/C disputes where the document examination will be of essence. And for the readers, the thesis will go in depth to analyze the selected cases, which set the principles of how to interpret the UCP rules. This involves depth analysis, the court decision and possible transmission value to the Norwegian law.

Chapter 9 is structured with the following problems;
- **Chapter 9.2**; What can a L/C applicant do to stop or to release a L/C payment?
- **Chapter 9.3**; Use of strict compliance principle when examine documents?
- **Chapter 9.4**; Which date to present document; Presentation date or L/C expiry date?

[55] Leading Court Cases page 75

9.2 What can a L/C applicant do to stop or to release a L/C payment? [56]

To analyze this problem, the case below will be of high relevance;



Bankers Trust Co. v State Bank of India [1991] (England)

A. SUMMARY OF FACTS

Bankers Trust Co., London Branch ("BT")
Issuing Bank

State Bank of India ("SBI")
Confirming Bank

1. On 14 April 1988, at the request of Harlow & Jones Ltd ("H&J"), BT opened an L/C of US$10.45 milion which was confirmed by SBI. The L/C was subject to UCP 400 and a telegraphic transfer reimbursement was allowed.

2. On 3 September 1988, steel products valued at US$10.35 million were shipped from India to the US by the beneficiary, Steel Authority of India Ltd ("SAIL").

3. On 9 September 1988, the beneficiary presented 967 sheets of paper to SBI, which presumably checked the documents and paid the beneficiary on the same day.

4. On 12 September 1988, SBI sent a telex certifying that all terms and conditions of the L/C had been complied with and obtained reimbursement of US$10.35 million from BT.

5. Upon receipt of the documents, BT took the following actions:
   - DAY 1 – 21 SEPTEMBER (WEDNESDAY)
   - ● BT received the documents.
   - DAY 2 – 22 SEPTEMBER (THURSDAY)
   - ● 1st check by BT started.
   - DAY 3 – 23 SEPTEMBER (FRIDAY)
   - ● 1st check by BT completed and 2nd check by BT started.
   - [24 & 25 September were bank holidays]
   - DAY 4 – 26 SEPTEMBER (MONDAY)
   - ● 2nd check by BT completed, and three discrepancies were identified. The documents were passed to H&J for further checking.
   - DAY 5 – 27 SEPTEMBER (TUESDAY)
   - ● Checking by H&J.
   - DAY 6 – 28 SEPTEMBER (WEDNESDAY)
   - ● BT sent a telex to SBI stating that the documents were non-compliant, but the telex did not mention any discrepancies.
   - DAY 7 – 29 SEPTEMBER (THURSDAY)
   - ● H&J returned the documents to BT and identified 46 discrepancies. H&J instructed BT not to return the documents to SBI unless full reimbursement from SBI had been received.
   - DAY 8 – 30 SEPTEMBER (FRIDAY)
   - ● BT commenced a final check of the documents and sent a rejection telex to SBI, setting out 23 discrepancies. The rejection telex also stated: "Documents held at your risk and will be at your disposal after payment to us."

6. SBI finally admitted that the documents were discrepant but it argued that BT was precluded from rejecting the documents because BT had failed to act in accordance with sub-Articles 16(c) and (d) of UCP 400.

[56] Leading Court Cases page 77

Is it possible under Article 16 of UCP 400 for the issuing bank to release the documents to the L/C applicant for further identification of discrepancies?

The lower court decided the above issue as follows;

1. A term enables the applicant i.e. H&J to check through the documents to find further discrepancies could not be implied into article 16.
2. The evidence showed that use of H&J were only to find discrepancies, and was to be held as illegal.

The court of Appeal judge endorsed the lower court's decision and said: "….. no way should a bank be allowed time to enable buyers to examine the documents for the purpose of discover further discrepancies".

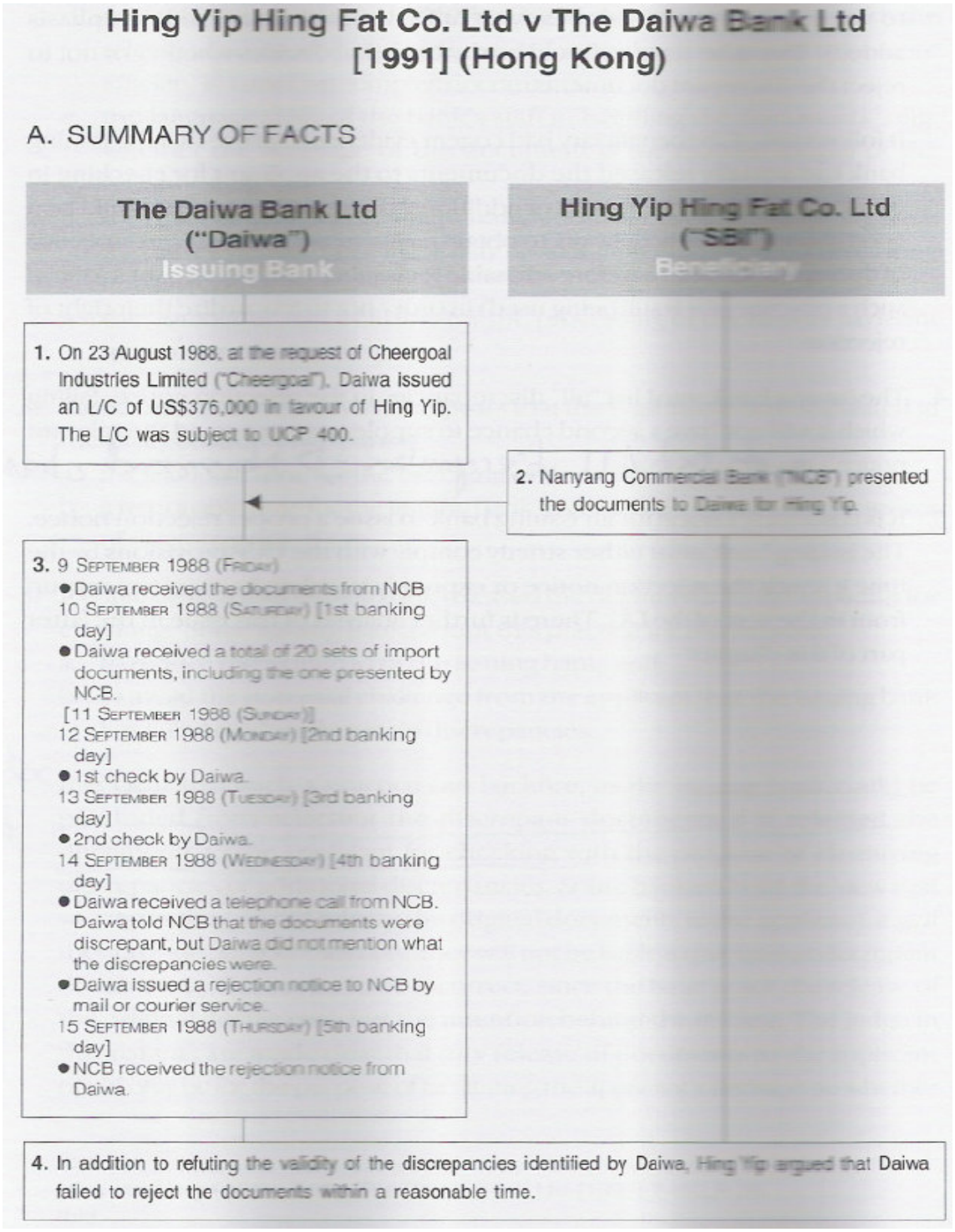
The above position is the same as that in UCP 500. Although sub-article 14 (C) of UCP 500 provides that an issuing bank may approach the applicant for a waiver of discrepant. The purpose of such approach is limited to obtaining a waver only, not to allow the L/C applicant to examine the documents for the purpose of discovering further discrepancies. Document examination is the job of the bank alone, and breach of this article may cause the issuing bank to be precluded of any further rejection.

For a practical point of view – a waiver by the L/C applicant – could be of enormous value to the L/C beneficiary. This will typically be when the bank uses a technical approach (which will be discussed in next chapter). If the courts allow the bank to use a technical approach, any minor discrepant will amount to no payment for the L/C beneficiary. Such rulings could be crucial for the L/C beneficiary and could ruin their business. Also, a long dispute in the court will not be of any ones interest. So the use of the UCP 500 sub-article 14 (c) have the power to solve this problem, which few trade practitioners have in their knowledge.

On the other hand, the L/C applicant takes a big risk by trusting the L/C beneficiary, as they are not allowed to check the documents for discrepancies themselves. A waiver will only secure the bank of not getting any claims, and any settlement further will be between the L/C applicant and the L/C beneficiary. For a recommendation, this UCP article should only be used if the buyer trust the supplier. If not, the buyer could make some requirement. E.g price reduction or other compensations if the goods turn out to be damaged.

9.3 Use of strict compliance principle when examine documents? [57]

To give the reader a good understanding of the "strict compliance principle" this will firstly be illustrated with the case as described below:



[57] Leading Court Cases page 86

There are two most relevant references which can be made upon the problem of strict compliance. The first one is the famous speech of Lord Summer in the Equitable Trust Co. of New York v Dawson partners, Ltd. [58] The second reference which explain the strict compliance principle is Gutteridge; The Law of Bankers Commercial Credit. [59]

In the above mention case (Daiwa Vs. SBI), the Council of Daiwa quoted the famous speech of Lord Summer to support his argumentation that the present documents were discrepant;

"*It is both common ground and common sense that in such transaction the accepting bank can only claim indemnity if the conditions on which it is authoriesed to accept are in the matter of the accompanying documents strictly observed. There is no room of documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if declines to do anything else, it is safe; it departs from the conditions laid down, it acts at its own risk.*"

The judge then referred to Gutteridge, which have a more commercial approach[60]; *"Strict compliance does not extend to the dotting of i's and crossing of it's or to be typographical errors either in the credit or the documents. Because of wide variations in language, it is impossible to be dogmatic or even to generalize. Each case is to be considered on it merits, and the bank's obligations may obviously be most difficult to fulfill".*

The judge also made the following comments after favoring the defendant;

"I accept the passage above quoted from Gutteridge which makes good sense and does not unnecessary violence to Lord Summer's strictures on compliance… I believe that my conclusion on typo error accords with justice and common sense."

This principle will be of absolute importance when practitioners quarrel with their business banks which refuse to release the L/C payment. As stated in ruling, the bank has a most difficult job to fulfill, but this should not be for the risk of the beneficiary who expect payment. As the bank only focuses on documents, and in most cases do not have relevant experience in shipping and offshore trades, there are a lot of problems related to this scenario. For a legal perspective there are no relevant cases in Scandinavian, but the court most likely will adopt the principles as explained, with a commercial approach. So for the trade finance practitioners and law firms who advice on these kinds of problems, it could be vital to mark this most important famous speech given by Gutteridge. But on the other hand, it is not unusual for many courts to look into substance of matter when deciding whether the rejection of documents is justified.

[58] Equitable Trust Co. of New York v Dawson partners, Ltd (1927) 27 LI.L. Rep. 49.
[59] Gutteridge; The Law of Bankers Commercial Credit (7th ed.) 1984 at p. 120.
[60] Gutteridge; The Law of Bankers Commercial Credit (7th ed.) 1984 at p. 87

By interpreting the principle of strict compliance it could also be important to establish which **essential elements that need to be included in a banks rejection**, as referred to UCP 400 Article 16 or UCP 500 Article 14.

If a bank send a rejection notice by mail or courier this will be in breach of the UCP articles, since it fails to inform the beneficiary about the grounds of rejection as soon as possible and without delay. The correct interpretation from ICC "without delay", include a telephone call followed with an written notice.

As the time limit is often essential for the beneficiary and crucial for its business, the issuing bank must without delay advise the presenting bank or beneficiary about (I) its rejection of documents, (II) the discrepancies identified and (III) the document disposal notice by telephone followed by a written confirmation. This could speed up the rejection process and is important for the beneficiary to get new and valid documents before the expiry date. It is critical that such rejection advice contain all of the three essential elements stated above, failing which the issuing bank could be precluded from rejecting the discrepant documents under sub-article 14 (e) of UCP 500. As regarding the UCP 600, there are no major changes, and the bank still have the risk by not including "all essential elements". See UCP 600 article 14.

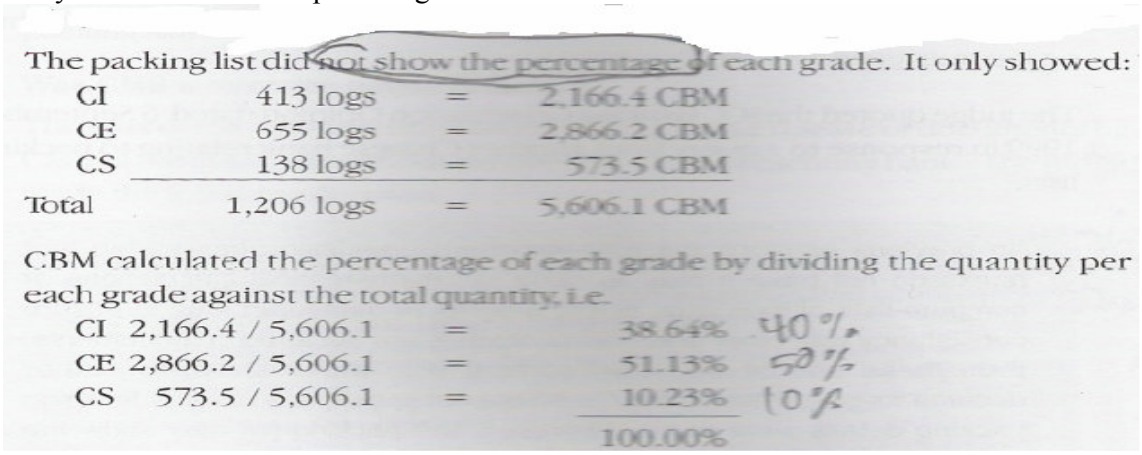
The problem of whether the court adopts a technical approach or commercial approach is more or less an impossible answer to conclude on. The courts approach will vary for each country, and there could be different judgment in the same country based on different circumstances.

For the practitioners - especially banks – there are major concerns as to these problems. If the bank fails to give a correct rejection message, they are precluded for adding any new discrepancies, see UCP 500 article 16. On the other hand, it is vital that the bank do a proper job when they analyze different documents. The question here will be if the international business society can accept that some jurisdictions have a more commercial approach than other? The aim of the UCP rules is that the bank should be liable by not doing a proper job. An expectation that the banks provides the necessary competence should not be an issue of discussion, but due to lack of competence it is unfortunate to see even established banks has problems related to doing a proper job.

For a legal perspective, the court's decision probably will depend on whether it gives more weight to "substance" or "form". If the court adopts a technical approach, a rejection would be defective if there were no express "rejection" wording. However, if the court adopts a practical and commercial approach, it would likely decide that a message of rejection had been duly conveyed by reception to the other party. Further discussion could be referred to the case "***Voest-Alpine Trading USA Corp Vs. Bank of China***" (2002 USA). In this case the plaintiff (Bank of China) had to pay the US company despite the documents were discrepant. The court said that the Bank of China were negligent by not providing a correct rejection, as stipulated in the UCP article 14.

If we look further into other cases which involve the strict compliance problem, we can look at the decision made in the case "**Credit Industriel et Commercial Vs. China Merchants Bank**" (2002 England). The main issue in this case will be that the bank need to show "reasonable care" when they examine documents. It is expected from the bank themselves to pick up a calculator and make a percentage calculation if the situation require it.

With a reference to the case **Credit Industriel et Commercial Vs. China Merchants Bank**, the problem involved a packing list which did not showed the percentage of grade. So will the bank have valid reason to reject such documents? If we use the principle of reasonable care every one can calculate a percentage. This can be illustrated as shown below:



The packing list did not show the percentage of each grade. It only showed:

CI	413 logs	=	2,166.4 CBM
CE	655 logs	=	2,866.2 CBM
CS	138 logs	=	573.5 CBM
Total	1,206 logs	=	5,606.1 CBM

CBM calculated the percentage of each grade by dividing the quantity per each grade against the total quantity, i.e.

CI	2,166.4 / 5,606.1	=	38.64%	40%
CE	2,866.2 / 5,606.1	=	51.13%	50%
CS	573.5 / 5,606.1	=	10.23%	10%
			100.00%	

The confirming bank held the view that; "the invoice is not consistent with the shown packing list" and thereby denied payment. They could not see any percentage in the given document.

The judge stated that he was remotely persuaded that reasonable care on the part of the confirming bank require such calculation to be made. He then referred to sub-article 13 (a) and article 21 of UCP 500 and explained his approach as follows:

A) The obligation on the bank is to exercise reasonable care, as determined in accordance with international standard banking practice.
B) The obligation is a passive one, in the sense of using reasonable care to assess the absence of any apparent inconsistency on the face of the documents as opposed to an active obligation to establish the existence of complete consistency on the basis of the material contained on the face of the document.

Since the packing list set out the exact number and volume of logs shipped, matching the totals in the bill of lading, the judge held the view that there was no percentage grade shown on the face of the packing list and no requirement that there should be. Absent further calculations, there was thus no inconsistency.

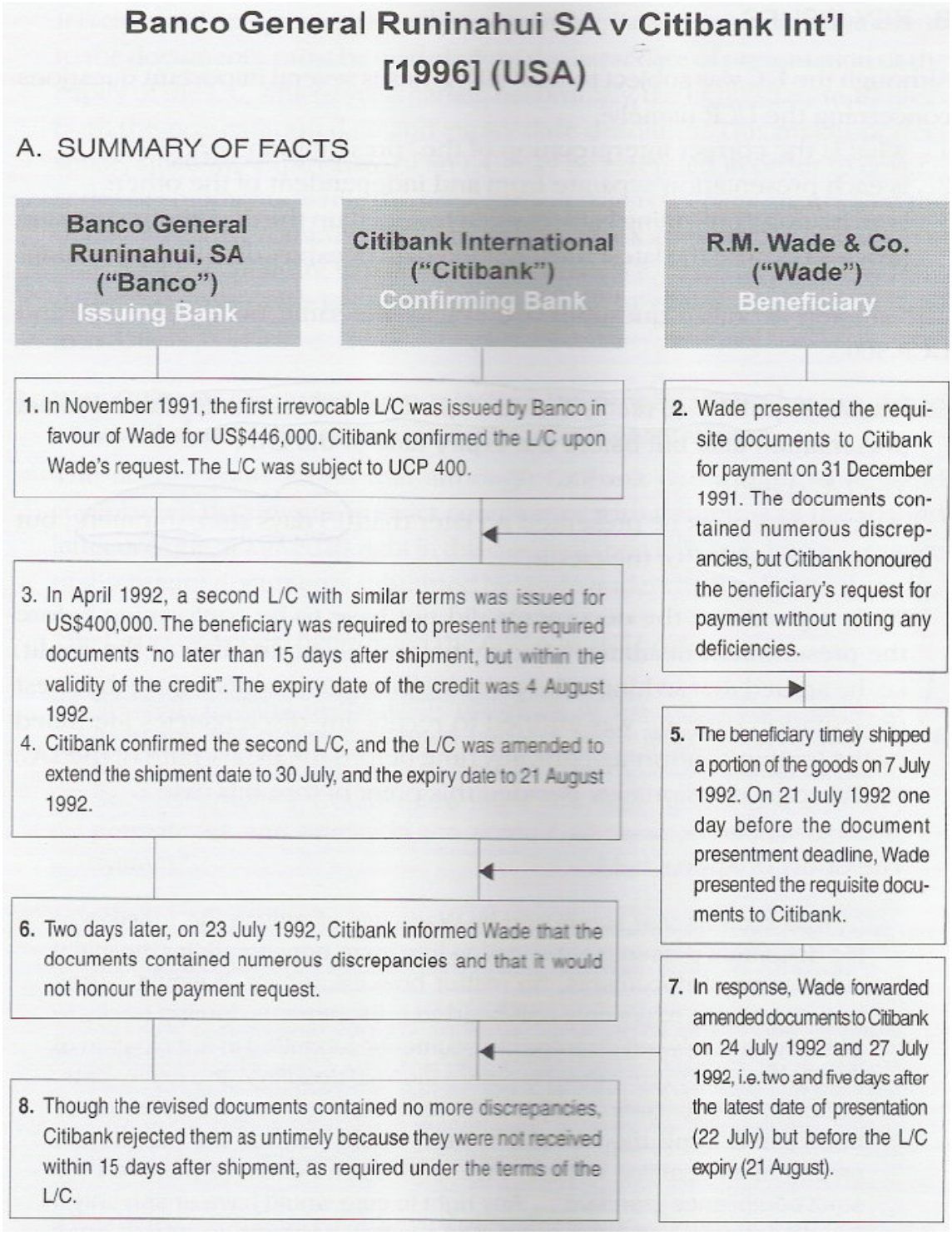
Also, the confirming bank failed to comply with UCP 500 sub-article 14 (e)[61], and the bank where therefore precluded from claiming that the documents were discrepant.

As a final remark, it seems like the banking people could need some updates on the UCP rules, especially if they want to keep their position dealing with letters of credit and advice their clients in best manner.

[61] UCP 500 article 14 (d). See Appendix A

9.4 Which date to present documents – presentation date or L/C expiry date? [62]

Also this problem could best be illustrated by a leading case. See details described below:



[62] Leading Court Cases page 93

As the relevant case mention uses UCP 400, the same rules apply in UCP 500/600. When this is said, we need to look further into the problem whether the beneficiary is entitled to rectify the discrepancies of documents after the document presentation date, in our example two and five days after the latest presentation date, but before the L/C expire.

The L/C state that the documents must be presented no later than 15 days after shipment, but within the validity of the credit.

The Court of Appeal held:

Citibank (confirming bank) was justified in dishonoring beneficiary's demand for payment. The reason for this was not to reduce the function of the document presentment deadline to a mere benchmark for the initial submission of documents, no matter how discrepant. Reduction of this rule would permit beneficiaries to make only half-hearted presentments, forcing banks to waste time reviewing discrepant documents submitted in anticipation of the opportunity to cure defects before the "real deadline", the expiry date. Enable a beneficiary to enjoy an unrestricted right to cure deficiencies before expiration of the credit would render the document presentment deadline virtually meaningless and effective subvert the strict compliance standard.

As a conclusion, it is clear that all document presentations must be before the latest date of presentation or the expiry of the L/C, whichever is earlier. The presentation date is to ensure that the documents are promptly sent to the issuing bank after each shipment, which often could be severable, like COA shipment contracts. This explains the key function of the latest day of presentation stipulated in an L/C.

Also, if the L/C beneficiary is a quarreler and pressure the bank to speed up the examination process, new rules by UCP 600 will be applicable from 1 July 2007, which states that the banks are to be given 5 banking days for document examination.

For the L/C beneficiary there could be a solution for the above discussed problem, and this involve the possibility to extend the document presentation date. But this solution will only work if the buyer (L/C applicant) accepts that the documents are delivered a couple of days late. If the buyer accepts such alteration, this must be communicated with the applicant bank which then needs to SWIFT a new L/C to the confirming bank. This alteration must then of course be within the L/C expiry date, and it would be highly recommended for the L/C beneficiary to include a late L/C expiry date, if they might have problems with providing documents. Another solution would of course be to have a long period to provide necessary documents, but this could be quite difficult to negotiate as the buyer usually need the papers as fast as possible.

CHAPTER 10: DISPUTES & REMEDIES AVAILABLE IN THE SALE & L/C CONTRACT

10.1 Introduction

For the law firms it will be quite profitable to go to court and settle the L/C disputes. But for the other trade finance practitioners, this could become quite expensive. And due to these circumstances - the topic of remedies - will be of great importance for all parties.

In chapter 10.2 the reader can learn about the possibilities to use ICC dispute system DOCDEX, which provides a speedy and cost-effective solution, rather than going to court.

Chapter will 10.3 will discuss some actual claim situations where the most interesting part will be the interpretation of lost profit and other consequential damages in relation to a L/C contract. When it comes to calculation of damages, problems related to third parties and re-sale will be up for discussion.

10.2 Arbitration system by ICC to resolve disputes - DOCDEX

As Lars Gorton in the 1980's discussed in his book "rembursrett", he recommended that the international chamber of commerce should develop an independent arbitration system where the disputing parties involved in a L/C contract could settle their differences based on the soft law given by UCP. Unfortunately this arbitration system only handle disputes related to L/C contracts, and calculation of damages will solely be based on other rules, as contract law.

Today, the parties can resolve their disputes through the ICC's DOCDEX dispute resolution system. DOCDEX provides a speedy and cost-effective dispute resolution mechanism to resolve disputes that relate to documentary instruments, including UCP, URC, URR and URDG. [63]

As quoted King Tak Fung; *"It is quite frustrating to read lower court's decision, as it is not uncommon that many courts misinterpret the UCP rules and make bad rulings".* But on the other hand, it is fortunate that the Court of Appeal finally reverse some of the decisions. However, the prolonged legal proceedings cost the parties a substantial amount of time and money. And it would be most recommended to use the DOCDEX.

[63] Leading Court Cases page 97

10.3 REMEDIES AVAILABLE IN THE SALE & L/C CONTRACT

In this chapter there will first be given an analyze of **different remedies available in the sale contract**. Such remedies could be divided in two; the right to cancel the sale contract and damages for the loss the innocent party sustains as a consequence of delay in the payment by the buyer. In this thesis the delayed payment would of course be regarded as buyers negligence and default by not providing a L/C as payment. Further more, this chapter includes examples of the innocent party obligation to mitigate losses. Such loss would contain relations to third parties, typically a manufacture that provide the seller with goods. Different kinds of mitigation scenarios will be up for discussion, but the interesting part will be how this influences the calculation of damages. (See chapter 10.3.1).

Secondly, there will be given an analyze of **different remedies available in the L/C contract** as referred to chapter 10.3.2. Remedies discussed in this chapter will include damages to third parties, when the buyer need to compensate for damages in a re-sale contract. A presumption to this discussion will be that the bank "has acted negligent", by paying the L/C sum on discrepant documents. But of course, the question whether the bank has acted negligence or not could be quite unclear. If the question of negligence is unclear, the court needs to interpret the UCP rules which will be up for further discussion later on. When the court has decided on the question of negligence, the interesting part will be how to calculate damages. This chapter will then include a example where the L/C applicant have paid damages related to the re-sale contract, and then of course want his expenses covered from the negligent bank.

10.3.1 Remedies available in the sale contract – Seller & Manufacture Vs. Buyer

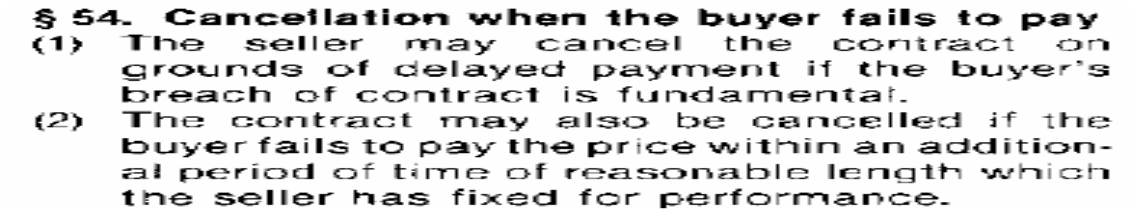
There could be quite different answers to this question, which is fully dependent on the applicable law. And the gap between Norwegian law and English law could be illustrated with the big gap of the North Sea between the two countries. But as a starting point the Norwegian legal system seems to have some of the same principles as the English legal system. This could especially be referred to calculation of damager and to get the innocent party back in their original contractual position, e.g. refunding the expenses used and other consequential damages as lost profit. See LOV-1988-05-13-27. (kjøpsloven).

Dealing with breach of a sale contract[64] – where the buyer is negligent by not issuing a L/C within the deadline - the starting point will be the Sale of Goods Act chapter VII. For the seller (first L/C beneficiary), it would be of major importance that the buyer manages to provide a L/C within the deadline as stipulated in the sale contract. This will further depend on the seller business planning which often include relations to third parties, such as a manufacture (second L/C beneficiary). To explain this further, it could be illustrated with an example where the seller has promised a third party (a manufactures) to pay him through a L/C and that this L/C will be sent to him by a given date. In practice this will typically be when the seller involves a manufactures (second L/C beneficiaries) which could be referred to the producer of the goods. So if the buyer is negligence due to their own default in providing the L/C by the given deadline, who will then be liable for damages to the manufacture company (second L/C beneficiary), when he have started to produce the goods and expect payment? It seems quite reasonable that the negligent party (the buyer) would be held

[64] Sale contract involving a seller/manufactures and a buyer

responsible for such damages, due to his negligence. But the interesting problem will be what kind of remedies will be available?

After discussing the problem of lost profit and other consequential damages with the well known Swedish professor Lars Gorton, there are no Scandinavian cases which could be of much help related to L/C's. It is a bit unclear how the Scandinavian legal system would handle these kinds of problems in contractual relations, especially related to lost profit. By quoting Lars Gorton as related to Swedish law; "there will be a breach of sale contract if the buyer is negligent by his own default when he does not provide a L/C by the time limit given in the sale contract". And of course, the same principle are given by the Norwegian law, see Norwegian sale of goods act § 54. "Cancellation".

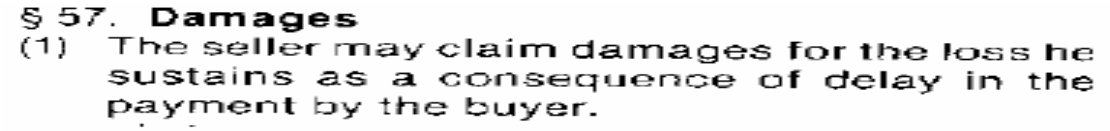


§ 54. Cancellation when the buyer fails to pay

(1) The seller may cancel the contract on grounds of delayed payment if the buyer's breach of contract is fundamental.

(2) The contract may also be cancelled if the buyer fails to pay the price within an additional period of time of reasonable length which the seller has fixed for performance.

If we compare the Norwegian law with English law, the English principles in breach of contract give the plaintiff right to both cancel the contract and claim damages. Such damages might include lost profit or other consequential damages. General principle of contractual damages are stated in the case *Robinson v Herman,*[65] Damages for Norwegian law could be referred to the SGA § 57, as shown below. And the general rule is that the seller may claim damages for loss he sustains as a consequence of delay in the payment. In relevance to L/C contract - a buyer non performance of issuing a L/C - would be regarded as late payment and thereby gives the plaintiff right to claim damages.



§ 57. Damages

(1) The seller may claim damages for the loss he sustains as a consequence of delay in the payment by the buyer.

If we try to interpret the SGA § 57, the seller may claim damages he sustains as a consequence the buyer doesn't provide a L/C. Such "damages" might then include damages as lost profit, lost income, lost contracts and other consequential damages etc. In other words, the Norwegian law seems to be quite similar to the English law. And for further calculation of damages, the innocent party (by Norwegian/English law) might include all damages for the loss he sustains, although within the reasonable contemplation.

An interesting discussion on the same topic could then be the obligations to mitigate losses, as referred to SGA § 70. The main rule by Norwegian law is that the innocent party needs to mitigate damages or try to do the outmost to prevent extra damages. By using examples from my own experience, I could illustrate the problem with an oil trader (seller) that offer to sell clean petroleum products FOB. And from the obvious fact - we know that the oil trader (seller) clearly is not an owner of the oil himself - and then need to make an order with a third party, (such as oil producer/manufacture). The main problem will then be how the oil trader (seller) can mitigate his loss, with the presumption that the oil purchase can't be withdrawn?

[65] *Robinson v Herman (1848) 1 Ex 850 ... 410*

First of all, the oil trader (seller) could try to sell the oil product to someone else. And to calculate the damages, this could be based on the original contract price and the new price. But unfortunately, this might not be all the damages for the L/C applicant account. If for instance the oil trader (seller) has provided for a ship transport, any termination fee or other consequential damages might occur. Further more, the oil trader (seller) might have problems in finding a new buyer, this could take some time, and expenses like storing of the goods could amount in high costs. If the oil trader (seller) does not find a new buyer this could amount in a termination fee to the oil producer/manufacture. This termination could then also cause stop in production for the producer/manufacture which again will be for the L/C applicant account.

The applicable rules in mitigation could be found in the Norwegian SGA § 70. And to look further into problem regarding oil trading, it could be interesting to analyze what to expect for the innocent party to do in relation to mitigate loss.

§ 70. **Obligation to mitigate losses. Relief from liability. International sales**

(1) A party who invokes a breach of contract by the other party must take such measures as are reasonable to mitigate the loss. If he fails to do so, he must sustain the corresponding part of the loss.

(2) The amount of the damages may be reduced if it would have an unreasonable effect on the party in breach considering the amount of the loss compared with such loss as would normally arise in similar cases, and other circumstances.

(3) In international sales the damages comprise only losses which could reasonably have been foreseen as a possible consequence of the breach, in the light of circumstances which the party knew or ought to have known at the time of concluding the contract. Damages in such sales may not be reduced according to the preceding paragraph.

If we look into the Norwegian law of contractual damages, the court need to investigate if the innocent party have mitigate their losses. By saying so, the court most probable would argue that lost profit and consequential damages will be within a reasonable contemplation. A exception to the example of the oil trader as mention above, the lost profit cant be 20 times higher than normal in the trading business. If claim from the oil trader (seller) seem to be out of proportion and totally unreasonable, the Norwegian court would most probable only give the lost profit as expected in the trading business.
If we look into the English law, the defendant (L/C applicant) can't plead and say to the court that this was a unfair deal, where the oil trader (seller) had achieved a higher profit than usually done in the oil trading business. So if we compare the Norwegian and English law there could be some deviations as related to calculate damages, such as lost profit.

Since there are no relevant cases in Scandinavian law report (ND) it would be most interesting to test if the plaintiff would get full compensation, especially lost profit. But as we know from previous principles given by the Scandinavian courts, the judges might reduce the claim if the plaintiff defaults in mitigate the loss or damages is to remote. Also the Scandinavian courts often adopt the principle of fairness, which is more or less unknown in the English system. On the other hand, the Norwegian Sale of Goods Act § 57 state that the seller may claim damages

for loss he sustains as a consequence of delay in the payment by the buyer. We can therefore see an indication that the Norwegian law adopts some of the English legal principles, where the oil trader (seller) would get full compensation, including lost profit and other consequential damages.

10.3.2 Remedies available in L/C contracts – Bank Vs. Buyer (incl. re-sale of goods)

Where a buyer has involved himself in contract for re-sale of goods, he will be liable for damages if the goods do not meet the expectation as stipulated in the re-sale contract. By saying so, this might have an effect on the calculation of damages in relation to a L/C contract. But before we can calculate damages, such as consequential damages to a re-sale, the question whether the bank has acted negligence or not need to be settled. If the question of negligence is unclear, the court needs to interpret the UCP rules based on the given L/C contract. Documents examination and rejection is one of the most disputed topics concerning L/C contracts, and it could be quite difficult to decide if the documents are discrepant or not. So if the bank receives a bill of lading containing discrepancies, what will then happen if the bank releases the L/C sum to the L/C beneficiary? Does the buyer need to accept such behavior from the bank, and who will be liable for damages in relation to the re-sale contract or other damages that might occur?

If we take the presumption that the bank "has acted negligent", by paying the L/C sum on discrepant documents the main issue will be to predict what the court will provide the innocent party. It seems likely that the court will to put the innocent party back in the original position had the contract been fully performed. This will then of course include lost profit.

By previous explanation in chapter 2.1 - the Danish Supreme Court[66] favored the bank - after paying the L/C sum based on a discrepant B/L document (Håkjerringfisk). For common people - it would be outrages to receive fish instead of meat – which is a totally different commodity. If the today's were faced with a similar case as the Danish case mentioned, it seems like the bank would be held liable for accepting a discrepant bill of lading document. If we take this problem further, and say that the buyer had already made a re-sale contract and where obligated to deliver meet to the customer. What would then happen if the buyer received fish, which then of course made it impossible to complete a re-sale? The first thing that pups up is the obligation to mitigate loss, where the buyer might sell the discrepant goods to another buyer. But if we take into consideration the Danish ruling, it seems like the plaintiff (the buyer) would not get any compensation. By the Danish court decision it seems like the court could totally disregard the UCP rules of document examination, and that the buyer need to accept discrepant goods. For the L/C applicant (the buyer) this Danish ruling is horrible reading, and the result could further amount in huge damages to the re-sale contract which then would be for the L/C applicant (buyer) account. Calculation of damages to those who expect goods by the re-sale contract might include indirect or consequential loss, such as interruption of production, loss of revenue, loss of contracts etc. These damages could then of course amount to high costs.

As we know, the Danish Supreme Court favored the bank even though the bank accepted a discrepant L/C document, so for any other buyer that would like to involve himself in re-sale

[66] Further interpretation of the ruling could be referred to Smith. Notes on page 60.

of goods, the UCP rules seems not to be reliable or protect the people who involve themselves in L/C contracts. It seems like the court focus on other circumstances that the actual UCP rules, which then might have an disaster result if the buyers are stuck with damaged goods he need to pay for.

When the Court should analyze a L/C contract based on discrepant document, it would be reasonable that the Norwegian courts adopt a commercial approach, rather than a technical approach as previous explained in chapter 9.3. The principle of "strict compliance" in L/C contracts has been disputed several times in the courts and for an international perspective there are two most relevant references which can be made to the problem. The first one is the famous speech of Lord Summer in the Equitable Trust Co. of New York v Dawson partners, Ltd. [67] The second reference which explains the strict compliance principle is Gutteridge; The Law of Bankers Commercial Credit.[68]

The principles laid out by Gutteridge, have a more commercial approach rather than a technical approach in Lord Summer's speech. As quoted from Gutteridge[69]; *"Strict compliance does not extend to the dotting of i's and crossing of it's or to be typographical errors either in the credit or the documents. Because of wide variations in language, it isimpossible to be dogmatic or even to generalize. Each case is to be considered on it merits, and the bank's obligations may obviously be most difficult to fulfill".*

The principle of commercial approach in L/C contracts will be of high importance when practitioners quarrel with their banks, either by refusing release of the L/C sum, or incorrect payment based on discrepant documents. All people would most probably admit that the L/C banks have a most difficult job to fulfill, but this should not be for the risk of the L/C beneficiary who expects payment, or L/C applicants that rely on receiving correct goods.

A court's decision on L/C contracts would most probably also depend on whether it gives more weight to "substance" or "form". If the Danish Supreme Court had adopted a technical approach in the examination of B/L containing (håkjerringfisk) the outcome would most probable favor the plaintiff (the buyer). Also, if the Danish Supreme Court had adopted a practical and commercial approach, it would most likely also favor the plaintiff (the buyer), as all know that fish is not the same as meat. Other vague arguments or circumstances should not be taken into account, and the court should rather focus on the UCP rules.

[67] Equitable Trust Co. of New York v Dawson partners, Ltd (1927) 27 LI.L. Rep. 49.
[68] Gutteridge; The Law of Bankers Commercial Credit (7th ed.) 1984 at p. 87
[69] Gutteridge; The Law of Bankers Commercial Credit (7th ed.) 1984 at p. 87

PART IV – FUTURE ASPECTS

CHAPTER 11: RECOMMENDATION OF RESEARCH FINDINGS

11.1 Introduction

Statistics given by SITRO Ltd show that well in excess of fifty percent of documents presented by exporters to banks for payment under letters of credit are rejected on first presentation. This can cause expensive delays for both the exporter and the importer and may even result in no payment at all. A great many of those rejections could be avoided if more care was taken to ensure that the documents called for in the credit are properly completed.

As mention by Lars Gorton in the 1980's, today's main problems are still related to the parties' non awareness of the strict rules of UCP and the content of documentary credits. Usually the involved bank don't give advice before entering into a sale contract, and the strict obligations for the seller to present valid documents could be crucial without knowing the UCP rules.

Also, due to shipping and offshore are based on international business, it would be most important for the trade finance practitioners to know about the English legal system which is the most used law world wide in these highly specialized trades. When this is said, the most important challenge will be to minimize different kinds of risks and to be able to calculate damages.

11.2 International court decisions and the transmission value to Norwegian Law

With reference to the Danish Supreme court decision in 1911[70] the Scandinavian courts has the possibility to totally disregard the UCP rules, and rather focus on other circumstances. By saying so, any international court decisions will have close to no transmission value for the Norwegian law. But on the other hand, the international court decisions might give a good indication of how to interpret the UCP rules. This could typically be the strict UCP rules of providing correct B/L document.

Due to the Scandinavian court previously has put emphasis on other circumstances than the actual rules given by UCP, the outcome of future L/C disputes in the Norwegian legal system could be difficult to predict. If the Norwegian Court adopts the principles given by the Danish Supreme court, this would result in total confusion. E.g. the L/C applicant needs to accept fish when he actually has paid for meat. This does not make any sense, and the Norwegian court should rather try to protect the innocent party. By referring to the UCP rules, the principle is clear; "The bank has the responsibility to examine the documents, and by not doing so the bank will be held liable".

[70] Further interpretation of the ruling could be referred to Smith. Notes on page 60.

If it is clear that one of the parties has acted negligent, the next problem will be how to calculate damages. To predict the courts decision as related to consequential damages and lost profit there are many circumstances to take into consideration. But the main rule related to contractual damages will be that the innocent party need to be put back in the same position had the contract been fully performed, e.g. lost profit. Any consequential damages that is not to remote will then also be awarded e.g. damages to third parties.

Since the commercial parties has the possibility to negotiate on the terms and conditions in the sale contract and the L/C contract, it would be highly recommended to include exclusion clauses as liquidated damages, e.g. limitation of liability to a particular sum and exclusion of consequential losses involving third parties. Finally, it is not possible to limit all liability, so for those who want to involve themselves in the sale of goods involving a L/C contract, it will be most important to know the rules and the risk involved.

LIST OF APPENDIX